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TEXT
ARMS

THE LAW OF
DAMAGES AND COMPENSATION

THE
LAWS OF ENGLAND

BEING A

COMPLETE STATEMENT OF THE
WHOLE LAW OF ENGLAND

BY

THE RIGHT HONOURABLE THE
EARL OF HALSBURY

*Lord High Chancellor of Great Britain 1885-86 ;
1886-92 ; and 1895-1905,*

AND

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THE LA^W OF DAMAGES AND COMPENSATION.

BY

F. O. ARNOLD, M.A., B.C. (CANTAB.),
OF THE INNER TEMPLE AND NORTHERN CIRCUIT,
BARRISTER-AT-LAW.

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DEDICATED

TO

MR. GORDON HEWART, K.C.

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PREFACE.

LORD HALSBURY in the course of a celebrated judgment (a) stated that “the whole region of inquiry into damages is one of extreme difficulty.”

In attempting to write a book upon such a subject, one of the chief difficulties, apart from the elucidation of general principles, is the arrangement of the subject-matter dealing with individual and particular branches of the law. In a sense, the law of damages and compensation may almost be said to be co-extensive with the greater part of the civil law. So diverse and heterogeneous are the topics to be dealt with that even an alphabetical arrangement might be advocated.

It is not pretended that the grouping of the subject-matter as contained in this book is unexceptionable or that it is based throughout upon one consecutive logical plan, nor is it claimed that every conceivable aspect of the law of damages and compensation finds exhaustive treatment. The main object sought to be attained has been the setting out, in the manner best adapted to ready reference, of a concise statement of the law of damages and compensation in most of its various branches.

In furtherance of this object, the actual details of only a restricted number of cases have been set out in full. Speaking generally, what have been set out are the principles—in as compendious a form as possible—to be deduced from decided cases, coupled with references in the footnotes to all the cases upon which such deductions have been constructed.

With regard to Chapter X., which treats of statutory damages and compensation, it is perhaps superfluous to say

(a) *The Mediana*, [1900] A. C. 113 at p. 116.

that no attempt has been made to give, in comprehensive outline, a complete exposition of the statutes with which this chapter is concerned. What this chapter purports to contain is a statement of the principles of law, brought up to date, which are acted upon by the courts in the awarding and—more particularly—in the assessment of damages and compensation under the Lands Clauses Acts, Lord Campbell's Act, 1846, the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1906, the Agricultural Holdings Act, 1908, and other statutes, together with reference to such provisions of the above-named statutes as directly bear upon the pecuniary rights and liabilities of the persons whom they affect.

In the majority of the foot-notes only a single reference has been given to each case cited. In the preliminary table of cases a full list of contemporaneous references will be found.

I desire to express my sincere thanks to Mr. Gordon Hewart, K.C., Mr. R. M. Lowe and Mr. J. H. Whitworth for advice received during the preparation of this book, to Mr. J. C. Jolly and Mr. H. Sidebotham for assistance in reading the proof-sheets, and to the Incorporated Council of Law Reporting for permission to re-print *in extenso*, in the Appendix, Lord Halsbury's judgment in the case of *The Mediana*.

F. O. ARNOLD.

PALATINE BANK BUILDINGS,
NORFOLK STREET,
MANCHESTER.

2, HARCOURT BUILDINGS,
TEMPLE,
18th December, 1912.

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THE LAW OF DAMAGES AND COMPENSATION.

CHAPTER I.

Introductory—Classification and Definitions.

DAMAGES constitute the pecuniary compensation or satisfaction which a plaintiff can recover by process of law, in respect of injury sustained through the act or default of a defendant, or of persons for whose acts a certain defendant may be liable.

Damages form merely one of the several forms of relief which in their appropriate circumstances may be obtained in courts of law.

It is a recognised principle of law that where an injury of an actionable character is committed by one individual upon another, the party receiving the injury is entitled to an indemnity for the same (a).

Such injury may arise through breach of contract or commission of a tort.

The awarding of damages is the method employed by a court of law of providing such indemnity, or of bringing about, as nearly as it can, a "*restitutio in integrum*" (b).

In certain cases, hereafter mentioned, the court may award damages by way of punishment.

The object which the court seeks to achieve by the awarding of damages can be clearly and succinctly stated.

The difficulties which beset the attainment of this object are due to the diverse and almost protean character of injuries, which may be inflicted or sustained, and the difficulties are correspondingly numerous (c).

(a) *The Argentino*, (1888) 13 P. D. 191, C. A., per Lord Esher, M.R., at p. 196; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, at p. 307.

(b) *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25, per Lord Blackburn, at p. 39; *The Argentino*, *ubi supra*, per Bowen, L.J., at pp. 200 and 201; cf. *Johnstone v. Hall*, (1856) 25 L. J. Ch. 462; cf., however, *British Columbia Saw Mill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499, per Bovill, C.J., at p. 506; *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Exch. 221, at pp. 230 and 231; see also Sedgwick on Damages (6th ed.), at p. 34.

(c) *The Mediana*, [1900] A. C. 113, per Lord Halsbury, L.C., at p. 116; cf. *Rodocanachi v. Milburn*, (1886) 18 Q. B. D. 67, C. A., per Lindley, L.J., at p. 78; and *Hobbs v. L. & S. W. Ry. Co.*, (1875) L. R. 10 Q. B. 111, per Blackburn, J., at p. 121.

Certain rules have therefore been laid down from time to time for the guidance of courts of law in the assessment of damages.

The chief object of this book is to enumerate and as far as possible elucidate these rules or principles for the ascertainment of damages.

Classification of Damages.

The different forms of damages which find designation in legal phraseology are classified under various heads, which are not all separate and distinct from one another.

I.—GENERAL AND SPECIAL DAMAGES (*d*).

General
damages.

The term “general damages” is applied to that species of damages which in law can theoretically be recovered whenever a legal right is violated (*e*).

A binding contract is an instance of the conferment of legal rights, and it follows that any breach of contract will give rise to a cause of action and that in such cases the law will imply an incurring of general damage (*f*).

But the damages awarded for breach of contract will be nominal if no special damage be proved (*f*).

In certain actions of tort, *e.g.*, libel, in which an incurring of general damage is implied by law, evidence may be tendered to support the presumption—in other words, in aggravation of general damages.

There is some authority for the proposition that evidence may be tendered for that purpose, even although the same evidence might otherwise have supported a plea of special damage had such plea been duly set out in the pleadings (*g*).

To this form of damages the somewhat equivocal term “general-special” damages has been applied. But, as stated in a subsequent chapter (*h*), the cases dealing with the pleading and proof of damages are somewhat conflicting, and if damages are sought

(*d*) Cf. *Ströms Bruks Actie Bolag v. Hutchinson*, [1905] A. C. 515, *per* Lord Macnaghten, at pp. 525, 526.

(*e*) *Ashby v. White*, (1703) 2 Ld. Raym. 938; 1 Smith, L.C. (11th ed.), 240, *per* Lord Holt, C.J., at p. 261; *Hiorf v. L. & N. W. Ry. Co.*, (1879) 4 Ex. D. 188, C.A., *per* Thesiger, L.J., at p. 198; *Bayliss v. Fisher*, (1830) 7 Bing. 153; cf. *Stanley v. Powell*, [1891] 1 Q. B. 86.

(*f*) *Marzetti v. Williams*, (1830) 1 B. & Ad. 415; *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408; *Fray v. Voules*, (1859) 1 E. & E. 839; *West v. Houghton*, (1879) 4 C. P. D. 197; *Columbus Co. v. Clowes*, [1903] 1 K. B. 244; cf. *Cole and others v. Christie and others*, (1910) 26 T. L. R. 469; *Sapwell v. Bass*, [1910] 2 K. B. 486; *Chaplin v. Hicks*, [1911] 2 K. B. 786; cf., however, *Rolin v. Steward*, (1854) 14 C. B. 595; and see title *Breach of Promise of Marriage*, *infra*, p. 206.

(*g*) *Vide* Odgers on Libel (4th ed.), at pp. 363, 364; *Encyclopædia of Laws of England* (2nd ed.), Vol. 4, at p. 328; *Cook v. Field*, (1788) 3 Esp. 133; *Ingram v. Lawson*, (1840) 6 Bing. N. C. 212; *Goslin v. Corry*, (1844) 7 M. & Gr. 342, at p. 347; cf., however, *Bluck v. Lovering*, (1885) 1 T. L. R. 497; cf. also *Evans v. Harries*, (1856) 1 H. & N. 251; *Millington v. Loring*, (1880) 6 Q. B. D. 190.

(*h*) *Vide infra*, p. 293.

in respect of a special loss or injury, it is safest to specially plead such loss in the statement of claim.

It is stated in some text-books (*i*) that general damages are such as the jury may give when the assessment cannot be laid down with exact precision, but must be, from the nature of the case, to some extent a matter of speculation.

In the case of certain torts, *e.g.*, libel, in which large general damages may be given, doubtless, such a definition holds good. But, it frequently happens that in a claim for special damages, in fact, even in a claim where special damage is the gist of the action, *e.g.*, in an action for negligence, the measure of damage is vague and a matter of somewhat speculative computation (*k*). In such cases, it would, obviously, lead to confusion to refer to such damages as general damages. Such damages are special damages though not "particular" damages (*l*). As stated above, all damages, in excess of nominal damages, for breach of contract, are special damages, but they are frequently difficult of accurate assessment (*m*).

The term "special damages" is variously employed (*n*):—

(1) In cases where the "gist" of the action consists of damage sustained (*o*), *i.e.*, where no cause of action exists without proof of damage, *e.g.*, in actions for deceit. Special damages.

It may be observed that the term "special damage" when thus employed is synonymous with "express loss" or "particular damage" (*p*), and with "damage in fact" (*q*), and with "special or particular cause of loss" (*r*), as employed in older cases, but now the term "particular damage" has acquired a different meaning, namely, that inferred when the term "special damage" is employed as it is in (3), *infra*.

(2) In cases where the "gist" of the action may or may not consist of "damage sustained," but the plaintiff in claiming damages seeks solely or *inter alia* to recover compensation in respect of forms of damage which are specially pleaded.

The term "special damage" in this sense may be employed both in cases where the damages are "at large" (*s*), but the

(*i*) Cf. Broom's Legal Maxims (8th ed.), at p. 186, n.; *Prehn v. Royal Bank of Liverpool*, (1870) L. R. 5 Ex. 92.

(*k*) *Knotts v. Curtis*, (1832) 5 C. & P. 322; *France v. Gaudet*, (1871) L. R. 6 Q. B. 199; *Potter v. Metropolitan Ry. Co.*, (1873) 28 L. T. 735; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. *Vide infra*, pp. 195, 296, 297.

(*l*) *Vide infra*, p. 4.

(*m*) *Richardson v. Mellish*, (1824) 2 Bing. 229; *Roper v. Johnson*, (1873) L. R. 8 C. P. 167; *Simpson v. L. & N. W. Ry. Co.*, (1876) 1 Q. B. D. 274, at p. 277; *Marcus v. Myers*, (1895) 11 T. L. R. 327; *Chaplin v. Hicks*, [1911] 2 K. B. 786.

(*n*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, C. A., *per* Bowen, L.J., at p. 528.

(*o*) *Ratcliffe v. Evans*, *ubi supra*, *per* Bowen, L.J., at pp. 528 and 532.

(*p*) *Cane v. Golding*, (1649) Sty. 169, 176.

(*q*) *Law v. Harwood*, (1628) Cro. Car. 140.

(*r*) *Tasburgh v. Day*, (1618) Cro. Jac. 484.

(*s*) "At large," cf. *Dixon v. Calcraft*, [1892] 1 Q. B. 458, *per* Lord Esher, M.R., at p. 462, and *Pickering v. James*, (1873) L. R. 8 C. P. 489, *per* Brett, J., at p. 509.

plaintiff is seeking to prove specific loss in addition to general damage (*t*), and also in cases where the essence or “gist” of the action consists of damage sustained (*u*).

Particular
damages.

(3) In cases where the plaintiff does not merely plead special forms of damage as in (2), *supra*, but seeks to recover compensation in respect of particular instances of damage arising under particular circumstances (*x*).

(2) and (3) differ in respect of the particularity of proof permitted and required at the trial of the action (*y*).

It is necessary to bear in mind the distinction between special damage and the evidence which may be called for the purpose of assessing the amount of special damage incurred. *Vide infra*, pp. 296, 297.

II.—LIQUIDATED AND UNLIQUIDATED DAMAGES.

Liquidated
damages.

The term “liquidated damages” is applied to such damages as constitute a liquidated demand payable in money (*z*). It therefore includes liquidated sums payable as damages under a statute (*a*), or by reason of a breach of contract, such payment having been previously agreed upon by the parties thereto (*b*). Needless to say, the damages claimed by a plaintiff do not become liquidated merely by specifying a fixed sum.

As a rule of practice it may be laid down that every claim for liquidated damages (but not every claim for a liquidated sum) comes within the scope of Ord. III., r. 6, R. S. C., and may therefore be claimed in a specially indorsed writ (*c*).

For the distinction between liquidated damages and penalty, *vide* Chap. II., p. 24.

Unliquidated
damages.

The term “unliquidated damages” is employed in cases where a plaintiff does not claim a pre-determined and inelastic sum, but seeks to recover such an amount as the court, in its discretion, is at liberty to award (*d*), though the pleadings may specify a particular amount.

Such amount is one which cannot be ascertained by mere arithmetic, or calculated according to a scale of charges or some other accepted rate or percentage (*e*).

(*t*) *Evans v. Harries*, (1856) 1 H. & N. 251; *Bodley v. Reynolds*, (1846) 8 Q. B. 779; cf. *Davis v. Oswell*, (1837) 7 C. & P. 804.

(*u*) Cf. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, C. A.; *Riding v. Smith*, (1876) 1 Ex. D. 91.

(*x*) *Rose v. Groves*, (1843) 5 M. & G. 613, *per* Cresswell, J., at pp. 616 and 618; *Iveson v. Moore*, (1699) 1 Ld. Raym. 486; cf. *Ratcliffe v. Evans*, *ubi supra*.

(*y*) *Rose v. Groves*, (1843) 5 M. & G. 613, *per* Cresswell, J., p. 618; *Bluck v. Lovering*, (1885) 1 T. L. R. 497.

(*z*) *Runnacles v. Mesquita*, (1876) 1 Q. B. D. 416; cf. R. S. C., Ord. III., r. 6.

(*a*) Cf. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57 (1).

(*b*) *Wallis v. Smith*, (1882) 21 Ch. D. 243.

(*c*) Cf. *Workman, Clark & Co., Ltd. v. Lloyd Brazileño*, [1908] 1 K. B. 968, C. A., *per* Kennedy, L.J., at p. 981; *Toomey v. Murphy*, [1897] 2 I. R. 601.

(*d*) *Hurst v. Hurst*, (1849) 4 Exch. 571.

(*e*) *Vide* Odgers on Pleading and Practice (6th ed.), p. 314.

As a rule of practice it may be laid down that no claim for unliquidated damages can be specially indorsed under Ord. III., r. 6, R. S. C., except one for “mesne profits” coupled with a claim for recovery of land (*f*).

III.—TERMS DENOTING DEGREE OF DAMAGES.

Various descriptive terms are used to denote the degree of damages which may be awarded or claimed. These are for the most part self-explanatory.

(1) Contemptuous or small (*g*) damages are such as the court awards when it feels compelled to give the plaintiff a verdict but is dissatisfied with the attitude which he adopts (*h*). The conventional sum selected by juries in such cases is a farthing. A verdict of this kind puts the plaintiff in some danger of being deprived of his costs (*i*). Contemptuous damages.

(2) Nominal damages constitute an intermediate class of damages, of a degree between contemptuous and substantial. They are awarded in cases where a plaintiff's legal rights have been infringed but no damage of a substantial character has directly accrued, or been proved to have accrued, from such infringement (*k*). Nominal damages.

In amount, nominal damages vary in practice from about forty shillings (*l*) to one shilling (*m*), though even a farthing has been awarded as nominal damages (*n*). A verdict awarding nominal damages will not necessarily suffice to prevent the plaintiff from being deprived of his costs (*o*), or from being made to pay the costs of both sides (*p*).

(3) Substantial damages (*q*) are such as the court awards in cases where the plaintiff has a well-founded cause of action, and it is intended that a fair and adequate compensation shall be given to him for the damage he has sustained. The assessment in such cases is made in as scientific a manner as possible—the amount determined upon being arrived at without undue Substantial damages.

(*f*) Cf. *Southport Tramways Co. v. Gandy*, [1897] 2 Q. B. 66, C. A.

(*g*) *The Mediana*, [1900] A. C. 113, per Lord Halsbury, L.C., at p. 116.

(*h*) *Kelly v. Sherlock*, (1866) 7 B. & S. 480, per Mellor, J., at p. 488.

(*i*) Cf. *O'Connor v. The Star Newspaper Co., Ltd.*, (1893) 68 L. T. 146, per Smith, L.J., at p. 148; *Jones v. Curling*, (1884) 13 Q. B. D. 262; *Huxley v. W. London Extension Ry. Co.*, (1889) 14 App. Cas. 26; *Macalister v. Steedman*, (1911) 27 T. L. R. 217.

(*k*) *Sapwell v. Bass*, [1910] 2 K. B. 486; *Northam v. Hurley*, (1853) 1 E. & B. 665.

(*l*) *Columbus Co. v. Clowes*, [1903] 1 K. B. 244.

(*m*) *Sapwell v. Bass*, [1910] 2 K. B. 486.

(*n*) *Mostyn v. Coles*, (1862) 7 H. & N. 872.

(*o*) *Marzetti v. Williams*, (1830) 1 B. & Ad. 415, per Parke, J., at p. 425; *Hiort v. L. & N. W. Ry. Co.*, (1879) 4 Ex. D. 188, C. A., per Thesiger, L.J., at p. 200; *Sapwell v. Bass*, *ubi supra*; *Cole and Others v. Christie and Others*, (1910) 26 T. L. R. 469, per Lawrance, J., at p. 470.

(*p*) *Harris v. Petherick*, (1879) 4 Q. B. D. 611; cf. *Forster v. Farquhar*, [1893] 1 Q. B. 564, at p. 569.

(*q*) *Harrington v. Derby Corporation*, [1905] 1 Ch. 205, per Buckley, J., at p. 228.

consideration of extraneous factors such as the attitude of the parties. It is in such cases that the principle of "*restitutio in integrum*" has especial application (*r*).

Vindictive
damages.

(4) Vindictive damages are awarded in cases where the court is entitled and sees fit to mulct the defendant in respect of the heinousness of his conduct (*s*).

Such damages are intended not merely to compensate the plaintiff for tangible loss, but to act at once as a penal imposition upon the defendant and a solace to the feelings of the plaintiff (*t*).

Vindictive damages may be awarded in certain cases of tort, *e.g.*, libel (*u*), slander (*x*), seduction (*y*), malicious prosecution (*z*), false imprisonment (*a*), assault (*b*), trespass (*c*), nuisance (*d*), and (very rarely) negligence (*e*). They cannot be awarded in cases of breach of contract (*f*), with the single exception of breach of promise of marriage (*g*). They may be given for breach of a covenant not to "commit waste" (*h*), but such form of action is substantially one of trespass (*h*). Vindictive damages cannot, however, be awarded even in the cases enumerated above without good cause being shown therefor, such as malice (*i*), arbitrary and contemptuous misfeasance (*k*), or some other markedly reprehensible attitude on the part of the defendant. Compensatory damages of a generous kind may be given in actions for adultery, but probably not vindictive damages, properly so called (*l*).

This form of damages has been variously termed retributory (*m*), punitive (*n*), aggravated (*o*), vindictive (*p*), liberal (*q*), penal (*r*), exemplary (*s*), and sentimental (*s*).

(*r*) Cf. *Robinson v. Harman*, (1848) 1 Exch. 850, *per* Parke, B., at p. 855.

(*s*) *Tullidge v. Wade*, (1769) 3 Wils. 18.

(*t*) *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25, *per* Lord Blackburn, at p. 39; *Berry v. Da Costa*, (1866) L. R. 1 C. P. 331, *per* Willes, J., at p. 333.

(*u*) *Jones v. Hulton & Co.*, [1910] A. C. 20, at p. 25.

(*x*) Cf. *Jackson v. Hopperton*, (1864) 16 C. B. N. S. 829, *per* Erie, J., at pp. 839 and 840.

(*y*) *Tullidge v. Wade*, (1769) 3 Wils. 18, at p. 19.

(*z*) *Hewlett v. Crutchley*, (1813) 5 Taunt. 277.

(*a*) *Edgell v. Francis*, (1840) 1 Man. & G. 222.

(*b*) *Merest v. Harvey*, (1814) 5 Taunt. 442, *per* Heath, J., at p. 444.

(*c*) *Williams v. Currie*, (1845) 1 C. B. 841.

(*d*) Cf. *Bell v. Midland Ry. Co.*, (1861) 10 C. B. N. S. 287.

(*e*) *Emblen v. Myers*, (1860) 6 H. & N. 54.

(*f*) *Sedgwick on Damages* (6th ed.), at pp. 238, 239; cf. *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488. *Vide infra*, p. 14.

(*g*) *Finlay v. Chirney*, (1888) 20 Q. B. D. 495, C. A., *per* Bowen, L.J., at p. 504.

(*h*) *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, *per* Bowen, L.J., at p. 618.

(*i*) *Adams v. Coleridge*, (1884) 1 T. L. R. 84.

(*k*) *Emblen v. Myers*, (1860) 6 H. & N. 54.

(*l*) Cf. *Wilton v. Webster*, (1835) 7 C. & P. 198, *per* Coleridge, J., at p. 202; *Buller*, N. P. (7th ed.), at p. 27.

(*m*) *Bell v. Midland Ry. Co.*, (1861) 10 C. B. N. S. 287, *per* Byles, J., at p. 308.

(*n*) *The Mediana*, [1900] A. C. 113, *per* Lord Halsbury, L.C., at p. 118.

(*o*) *Clark v. Newsam*, (1847) 1 Exch. 131, *per* Pollock, C.B., at p. 140.

(*p*) *Crouch v. G. N. Ry. Co.*, (1856) 11 Exch. 742, *per* Martin, B., at p. 759.

(*q*) *Tullidge v. Wade*, (1769) 3 Wils. 18, *per* Wilmot, C.J.

(*r*) *McArthur v. Cornwall*, [1892] A. C. 75, *per* Lord Hobhouse, at p. 88.

(*s*) *Finlay v. Chirney*, (1888) 20 Q. B. D. 494, *per* Bowen, L.J., at p. 507.

IV.—SUNDRY TERMS APPLIED TO DAMAGES.

In addition to the above, there are certain descriptive terms applied to damages which more or less explain their nature or the basis on which they are awarded.

Statutory Damages.

The term “statutory damages” is applied in cases—

(1) Where damages are awarded for injury sustained owing to the defendant's non-compliance with the provisions of a certain statute (*t*).

(2) Where damages are awarded to a plaintiff whose right of action accrues under a certain statute—the defendant, however, not necessarily being guilty of any statutory infringement, or of any wrongful act (*u*).

Prospective Damages.

The term “prospective damages” is applied to compensation given in respect of probable future loss in cases where the court in awarding damages makes one final assessment, comprehending both loss already sustained and loss which may accrue in the future (*x*), arising out of a cause of action which has already accrued (*x*).

Prospective damages cannot be awarded where a continuing cause of action subsists (*y*).

Consequential Damages.

The term “consequential damages” is applied to such damages as may in certain cases (*z*) be awarded, where the wrong done gives rise to loss of an indirect or remote character (*a*), which loss, however, is sufficiently proximate to the cause of action to be recoverable (*b*).

Compensation.

The term compensation is ordinarily used in relation to a lawful act which has caused loss or injury, in respect of which

(*t*) Cf. *Dormont v. Furness Ry. Co.*, (1883) 11 Q. B. D. 496.

(*u*) Cf. Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).

(*x*) *Vide infra*, p. 20; cf. *Emery Co. v. Wells*, [1906] A. C. 515, *per* Sir A. Wilson, at p. 525.

(*y*) *Battishill v. Reed*, (1856) 18 C. B. 696; *West Leigh Colliery Co., Ltd. v. Tunnicliffe & Hampson, Ltd.*, [1908] A. C. 27; cf., however, *Martin v. Price*, [1894] 1 Ch. 276.

(*z*) Cf. *Hadley v. Baxendale*, (1854) 9 Exch. 341; Sedgwick on Damages (6th ed.), at pp. 68 and 81.

(*a*) *Lepla v. Rogers*, [1892] 1 Q. B. 31; cf. *The Argentino*, (1888) 13 P. D. 191, C. A., *per* Lord Esher, M.R., at p. 197.

(*b*) Cf. *Appleby v. Franklin*, (1885) 17 Q. B. D. 93, *per* Wills, J., at p. 95.

an indemnity—more or less adequate—may be obtained in accordance with a particular statute (*c*).

It is not ordinarily used as an equivalent for “damages” (*d*). It is practically synonymous with “statutory damages” as defined in the second definition thereof set out above (*e*).

(*c*) *E.g.*, Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28).

(*d*) Cf. *Dixon v. Calcraft*, [1892] 1 Q. B. 458, *per* Lord Esher, M.R., at p. 463.

(*e*) *Vide supra*, p. 7.

CHAPTER II.

Section	I.—Measure of Damages.
„	II.—Liquidated Damages or Penalty.
„	III.—Interest.

SECTION I.

Measure of Damages.

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THE term “measure of damages” signifies the basis of calculation, or the standard, or the factors in computation, to be employed in any given case, in the assessment of damages. Introductory.

According to the particular cause of action sued upon, the measure of damages may be very rigidly defined, *e.g.*, under a claim on a specially indorsed writ; or it may be more elastic, *e.g.*, in a case of libel where some item of special damage is set down; or it may be wholly “at large,” *e.g.*, in a case of libel where no special damages are claimed.

As has already been stated (*a*), vindictive damages cannot be awarded for breach of contract, with the single exception of breach of promise of marriage, and, speaking generally, it may be said that the measure of damages is more vague in tort than in contract (*b*). Thus, although, on the one hand, vindictive damages may, under proper circumstances (*c*), be given for certain torts, on the other hand, in the case of such a tort as personal injury arising through negligence, the court does not pretend to be able to make a complete and adequate compensation (*d*).

In other words, therefore, the principle of “*restitutio in integrum*” has, in one sense, a more restricted, and, in another sense, a more thorough, application in contract than in tort (*e*).

In determining the measure of damages, whether in tort or

(*a*) *Vide supra*, p. 6.

(*b*) *Alder v. Keighley*, (1846) 15 M. & W. 117, at p. 119; *Fletcher v. Tayleur*, (1855) 17 C. B. 21, *per* Willes, J., at p. 29; *British Columbia Sawmill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499, at p. 506.

(*c*) *Vide supra*, p. 6.

(*d*) *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Exch. 221, at pp. 230 and 231; *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78, at p. 84; *Johnston v. G. W. Ry. Co.*, [1904] 2 K. B. 250.

(*e*) Cf. *Robinson v. Harman*, (1848) 1 Exch. 850, at p. 855; *Dunham v. Clare*, [1902] 2 K. B. 292, *per* Collins, M.R., at p. 296.

contract, one of the chief factors to be considered is the question of remoteness of damage. In so far as a plaintiff alleges damage which the Court deems to be too remote, such damage may be said to constitute *damnum sine injuria*; but the plaintiff himself may, in some such cases, be said to have suffered *injuria sine damno* (*f*)—using the words with a slightly different shade of meaning. The principles governing the measure of damages recoverable differ somewhat in tort and in contract, but there is high judicial authority for the proposition that, upon the question of remoteness of damage, no distinction exists between tort and contract (*g*). This proposition, however, merely signifies that, in both tort and contract, any damage claimed must flow or arise, as a natural consequence, from the defendant's wrongful act. It manifestly does not signify that damage accruing, *e.g.*, to the plaintiff's reputation, is equally remote or recoverable, whether the defendant has injured it through tort or breach of contract (*h*).

In the subsequent chapters of this book the measure of damages in relation to particular individual causes of action is dealt with *seriatim*.

In this section it is proposed, in brief outline, to present a general survey of the measure of damages in contract and in tort.

Contract.

First principle governing measure of damages.

The first principle governing the measure of damages in an action for breach of contract is that, apart from merely nominal damages, which are theoretically recoverable whenever a contract has been broken (*i*), no damages are recoverable apart from special damage (*k*).

The particularity of proof submitted and required to sustain a claim for special damages may vary according to the nature of the claim (*l*).

Second principle—damages must not be too remote.

The second principle governing the measure of damages in an action for breach of contract, and the one which, in fact, is of primary importance in all actions for damages, is that the damages alleged must not be too remote. In other words, only proximate or consequential damages can be recovered.

In considering the meaning of the term consequential it may

(*f*) *Remorquage à Hélice v. Bennetts*, [1911] 1 K. B. 243, *per* Hamilton, J., at p. 248.

(*g*) *The Notting Hill*, (1884) 9 P. D. 105, *per* Brett, M.R., at p. 114; *cf.* *Cobb v. G. W. Ry. Co.*, [1893] 1 Q. B. 459, *per* Bowen, L.J., at p. 464.

(*h*) *Vide infra*, at p. 16.

(*i*) *Vide supra*, p. 2.

(*k*) For a possible exception to this rule, *vide infra*, pp. 14, note (*g*), 274.

(*l*) *Vide infra*, pp. 296, 297.

be advantageous at the outset to cite one or two instances on each side of the line.

In the case of *Walton v. Fothergill* (m), Tindal, C.J., said, "if I contract to transfer stock and do not, the party with whom I contracted has no right to tell me a month afterwards that if I had transferred the stock he could have bought an estate with the money (n). There was a case of a man who brought an action against the keeper of a ferryboat, for refusing to carry him across a river, in consequence of which he sustained loss by not being able to keep an appointment. But it was held that he could not recover damages on any such ground" (o).

On the other hand, in the case of *Lepla v. Rogers* (p), in which a lessee, in contravention of a covenant not to sub-let his premises without his lessor's consent, did sub-let the premises, without such consent, to a person who intended, as he knew, to use them, and who, in fact, did use them, as a turpentine distillery, it was held, upon the premises having been burnt down by a fire arising from such use, that the loss caused by the fire was the natural result of the breach of covenant, and was, therefore, recoverable as damages. Again, if a train be specially advertised for conveyance of goods to a particular market, and it fails to arrive in time for that market, loss of profit may be claimed as a consequential loss and recovered (q).

The leading case upon the subject of damages arising from breach of contract is *Hadley v. Baxendale* (r). In that case three so-called rules were laid down :

Rules laid down in *Hadley v. Baxendale*.

- (1) Damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable ;
- (2) Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract (s) ;
- (3) Where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances,

(m) (1835) 7 C. & P. 392, at p. 394.

(n) Cf. *Skinner v. City of London Insurance Corporation*, (1885) 14 Q. B. D. 882.

(o) Cf. *Watson v. Ambergate Ry. Co.*, (1851) 15 Jur. 448, per Erle, J., at p. 450 : cf., however, *Cooke v. Midland Ry. Co.*, (1892) 57 J. P. 388.

(p) [1893] 1 Q. B. 31. Another strong case of damages being held consequential is *Marcus v. Myers*, (1895) 11 T. L. R. 327.

(q) Cf. *Simpson v. L. & N. W. Ry. Co.*, (1876) 1 Q. B. D. 274, per Cockburn, C.J., at p. 277 ; cf. also *Schulze v. G. E. Ry. Co.*, (1887) 19 Q. B. D. 30 ; *Cooke v. Midland Ry. Co.*, *ubi supra*.

(r) (1854) 9 Exch. 341.

(s) Cf. *Bostock v. Nicholson*, [1904] 1 K. B. 725.

then such special damage must be supposed to have been contemplated by the parties to the contract and is recoverable (*t*).

With regard to the last rule it should be added that "in order that the notice may have any effect it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss" (*u*).

It will thus be seen that the often-quoted dictum of Parke B., that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed" (*x*), must be taken to be subject to certain limitations (*y*).

Another way of expressing the rule, with regard to the damages recoverable for breach of contract, is, to say that such damages are recoverable as would have been in the contemplation of a reasonable man when the contract was made, as being likely to arise in consequence of a breach of the contract (*z*). Though, it has been objected that this test is unsatisfactory, on the ground that parties, when they make contracts, contemplate fulfilling them and not breaking them (*a*).

Damages not too remote even though speculative.

It has already been stated (*b*), that the precision required for the proof of damage arising from breach of contract may vary according to the nature of the claim, and it is to be observed, that it is no answer to a claim for damages to object that they must, to some extent, be a matter of speculation and consequently difficult of assessment (*c*).

Injury to credit usually too remote.

In general, it may be said that injury to feelings, credit, or personal or business reputation, caused through breach of contract, is too remote a form of damage to be actionable (*d*). In

(*t*) See Mayne on Damages (8th ed.), at pp. 13 and 14.

(*u*) *Horne v. Midland Ry. Co.*, (1873) L. R. 8 C. P. 131, per Blackburn, J.; cf. *Smeed v. Foord*, (1859) 1 E. & E. 602, at p. 608; *Collard v. S. E. Ry. Co.*, (1861) 7 H. & N. 79; *British Columbia Sawmill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499; *Candy v. Midland Ry. Co.*, (1878) 38 L. T. 226; *Hydraulic Engineering Co. v. McHaffie*, (1878) 4 Q. B. D. 670, at p. 678; *Gillespie Bros. v. Cheney & Co.*, [1896] 2 Q. B. 59.

(*x*) *Robinson v. Harman*, (1848) 1 Exch. 850, at p. 855; cf. *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301.

(*y*) Cf. *Wallis v. Smith*, (1882) 21 Ch. D. 243, per Jessel, M.R., at p. 257.

(*z*) *Cory v. Thames Ironworks Co.*, (1868) L. R. 3 Q. B. 181; *Agius v. G. W. Colliery Co.*, [1899] 1 Q. B. 413, at p. 419; *De La Bere v. Pearson, Ltd.*, [1908] 1 K. B. 280.

(*a*) Cf. *Prehn v. Royal Bank of Liverpool*, (1870) L. R. 5 Ex. 92, per Martin, B.

(*b*) *Vide supra*, p. 3.

(*c*) *Simpson v. L. & N. W. Ry. Co.*, (1876) 1 Q. B. D. 274, at p. 277; cf. *Richardson v. Mellish*, (1824) 2 Bing. 229; *Roper v. Johnson*, (1873) L. R. 8 C. P. 167; *Marcus v. Myers*, (1895) 11 T. L. R. 327; *Chaplin v. Hicks*, [1911] 2 K. B. 786.

(*d*) *Beckham v. Drake*, (1849) 2 H. L. C. 579, at p. 607; *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408, at p. 411; *Fitzgerald v. Leonard*, (1893) 32 L. R. Ir. 675; *Bostock v. Nicholson*, [1904] 1 K. B. 725; cf. *Fletcher v. Tayleur*, (1855) 17 C. B. 21, per Willes, J., at p. 29; *Addis v. Gramophone Co.*, [1909] A. C. 488; cf., however, *Marcus v. Myers*, (1895) 11 T. L. R. 327.

this respect the measure of damages in contract differs widely from that which obtains in tort (*e*). In certain exceptional cases, where special circumstances exist, the above-mentioned rule does not apply (*f*).

Inconvenience caused by breach of contract also does not sound in damages where it merely consists of annoyance, and does not necessarily entail tangible pecuniary loss (*ff*). Where, however, the inconvenience produces physical or material or pecuniary results, and is of a substantial character, damages may be recovered in respect of it (*g*). Furthermore, expenses legitimately and reasonably incurred to avert inconvenience arising from the defendant's breach of contract may be recovered (*h*). But if such expenses, when laid out, ultimately result in a more favourable return to the plaintiff than the due performance of the contract would have done, the loss and gain must be balanced one against the other (*i*).

Damage caused by inconvenience may or may not be too remote.

Expenses incurred in mitigating loss.

It follows, as a corollary from this, that it is indeed the duty of a plaintiff to minimise his loss as far as possible, and that in so far as he might have averted loss by reasonable prudence, but has failed to do so, to that extent his loss is not consequential, and is therefore not recoverable (*k*).

The question as to whether, and under what circumstances, loss of profits (*l*), costs of other proceedings (*m*), and damages payable to sub-contractors (*n*), do or do not constitute consequential damages, so as to be recoverable in an action for breach of contract, is discussed in the subsequent chapters dealing with the sale of land, the sale and carriage of goods, and

Loss of profits, etc.

(*e*) *Vide infra*, p. 16.

(*f*) *Vide infra*, at p. 274; cf. *Addis v. Gramophone Co.*, [1909] A. C. 488, at p. 491.

(*ff*) See note (*d*), p. 12, *ante*.

(*g*) *Hobbs v. L. & S. W. Ry. Co.*, (1875) L. R. 10 Q. B. 111, at p. 117; *Cooke v. Midland Ry. Co.*, (1892) 57 J. P. 388; *Atkins v. Hutton*, (1910) 103 L. T. 514; cf. *McMahon v. Field*, (1881) 7 Q. B. D. 591; *Bell v. G. N. Ry. Co.*, (1890) 26 L. R. Ir. 428; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; cf. also *Green v. Eales*, (1841) 2 Q. B. 225, at p. 238; *Burton v. Pinkerton*, (1867) L. R. 2 Ex. 340; *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

(*h*) *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408; *Hinde v. Liddell*, (1875) L. R. 10 Q. B. 263, *per* Blackburn, J., at p. 268; cf. *Le Blanche v. L. & N. W. Ry. Co.*, (1876) 1 C. P. D. 286; *Millen v. Brash*, (1881) 8 Q. B. D. 35; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105.

(*i*) *British Westinghouse Electric Co. v. Underground Electric Ry. Co.*, [1912] W. N. 212; cf. *Erie County Natural Gas and Fuel Co. v. Carroll*, *ubi supra*.

(*k*) *Wilson v. Hicks*, (1857) 26 L. J. Ex. 242; *Frost v. Knight*, (1872) L. R. 7 Ex. 111, at p. 114; *Roper v. Johnson*, (1873) L. R. 8 C. P. 167, at p. 181; *The Blenheim*, (1885) 10 P. D. 167; *Nickoll and Knight v. Ashton*, [1900] 2 Q. B. 298; [1901] 2 K. B. 126; cf. *Le Blanche v. L. & N. W. Ry. Co.*, *ubi supra*; *Lodge Holes Colliery Co. v. Wednesbury Corporation*, [1908] A. C. 323, *per* Lord Loreburn, L.C., at p. 326; cf., however, *Arden v. Goodacre*, (1851) 11 C. B. 371; *Smith v. McGuire*, (1858) 27 L. J. Ex. 465, *per* Martin, B., at p. 472.

(*l*) *Vide infra*, at pp. 44, 45, 47, 52, 84, 85, 87, 89, 90, 131—134.

(*m*) *Vide infra*, at pp. 50, 90, 133, 306—309.

(*n*) *Vide infra*, at pp. 85, 90, 133.

recovery of costs. The reader is referred in the footnotes to these chapters for a discussion of this question.

Distinction between sale of land and sale of goods.

It is important to note the distinction between the measure of damages applicable in contracts for the sale of land and that applicable in contracts for the sale of goods. In the case of the former, no damages are, in general, recoverable for "loss of the bargain" (*o*). The explanation of this distinction seems to be that, since the ascertainment of a title to real property is a matter of much greater difficulty and complexity than the ascertainment of a title to goods, a vendor of real property who fails to convey ought not to be mulcted in damages in respect of a matter in which he may, without negligence, be in a state of some uncertainty.

Third principle governing measure of damages.

The third principle governing the measure of damages recoverable in an action for breach of contract is that, with the single exception of breach of promise of marriage (*p*), the motives of the parties are immaterial, and consequently nothing in the nature of aggravated or vindictive damages can be awarded (*q*). This is really a corollary of the two first-mentioned principles.

Alternative remedies.

It may happen that, in respect of the same wrongful act, the plaintiff has a remedy in an action for breach of contract, and an alternative remedy in tort (*r*). But, if the plaintiff sue in contract, he lets in the consequences of that form of action, with the result that the measure of damages is necessarily governed by rules applicable in contract (*s*).

Tort.

Torts divisible into two classes according to whether proof of special damage is or is not necessary.

Torts are of two kinds, namely, (1) those in which no action lies without proof of special damage, that is to say, in which the damage done is the gist of the action, *e.g.*, slander not actionable *per se* (*t*), negligence arising under circumstances in which no absolute duty is imposed (*u*), deceit (*x*);

and (2) those in which general damages, with or without additional special damages, can be awarded. In the first-

(*o*) *Flureau v. Thornhill*, (1776) 2 W. Bl. 1078; *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158; cf. *Engel v. Fitch*, (1869) L. R. 4 Q. B. 659. *Vide infra*, p. 44.

(*p*) *Vide infra*, p. 206.

(*q*) *Berry v. Da Costa*, (1866) L. R. 1 C. P. 331, *per* Willes, J., at p. 334; *Addis v. Gramophone Co.*, [1909] A. C. 488; cf. *Baker v. Denker Ashanti Corporation*, (1903) 20 T. L. R. 37; *per contra Smith v. Day*, (1882) 21 Ch. D. 421, *per* Brett, L.J., at p. 428; *Maw v. Jones*, (1890) 25 Q. B. D. 107. Cases relating to dishonouring of cheques, etc., *vide infra*, p. 274, are on an exceptional footing: cf. *Addis v. Gramophone Co.*, *ubi supra*, at p. 491.

(*r*) Cf. *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158, at p. 207.

(*s*) *Thorpe v. Thorpe*, (1832) 3 B. & Ad. 580, *per* Parke, J., at p. 585; cf. *Engel v. Fitch*, (1869) L. R. 3 Q. B. 314, at p. 327.

(*t*) *Vide infra*, p. 198.

(*u*) *Vide infra*, p. 194; cf. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, *per* Lord Blackburn, at p. 142.

(*x*) *Vide infra*, p. 219.

mentioned class of torts, the damages recoverable are the amount of loss naturally resulting from the defendant's wrongful act and duly proved as special damage (*y*). In the second class of torts, damages may be awarded by way of general damages, even if no special or actual damage be proved, though they may be merely nominal in amount (*z*). In this latter class of tort the wrongful act itself—not the damage done—constitutes the cause of action (*z*), though special damage resulting may also be recovered (*a*).

As a general but not invariable rule, it may be stated that general damages for tort can be given, and given only, in the case of those torts in which vindictive damages may be awarded (*b*), namely, libel, slander, seduction, malicious prosecution, false imprisonment, assault, trespass, nuisance. The exceptions to this rule are as follows: General damages are recoverable in an action of trover or conversion, but vindictive damages are not (*c*); general damages are not, strictly speaking, recoverable in actions of slander not actionable *per se*, but, in practice, when some special damage has been proved, vindictive damages are sometimes awarded (*d*), and the same applies in actions of nuisance (*e*) and seduction (*f*), and, in one exceptional case, vindictive damages were given for negligence (*g*).

Relation between general and vindictive damages.

In actions of tort based on contract, nominal damages, by way of general damage, are recoverable, without proof of any special damage (*h*). Thus, in an action for negligence, in which contractual obligations impose upon the defendant an absolute and not merely a relative duty of care, nominal damages can be recovered for a breach of such duty, in other words, for negligence, even though no special or actual damage be proved (*i*).

Tort based on contract.

In tort, as in contract, one of the chief considerations governing the measure of damages recoverable is the question of remoteness of damage. But, as has already been pointed out (*k*), the measure of damages in tort is, in general, more vague and less precise than in contract, since in many actions of tort large general damages may be awarded.

Remoteness of damage.

- (*y*) Cf. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127.
- (*z*) *Ashby v. White*, (1703) 2 Ld. Raym. 938; *Tripp v. Thomas*, (1824) 3 B. & C. 427; *Embrey v. Owen*, (1851) 6 Exch. 353; *Northam v. Hurley*, (1853) 1 E. & B. 665; *Harrop v. Hirst*, (1868) L. R. 4 Exch. 43; cf. *Medway Co. v. Romney (Earl)*, (1861) 9 C. B. N. S. 575.
- (*a*) Cf. *Bodley v. Reynolds*, (1846) 8 Q. B. 779. *Vide infra*, p. 297.
- (*b*) *Vide supra*, p. 6.
- (*c*) *Vide infra*, pp. 97, 106.
- (*d*) *Vide infra*, pp. 198, 199.
- (*e*) *Vide infra*, p. 43.
- (*f*) *Vide infra*, pp. 208, 209.
- (*g*) *Emblen v. Myers*, (1860) 6 H. & N. 54.
- (*h*) Cf. *Marzetti v. Williams*, (1830) 1 B. & Ad. 415, at p. 424; *Warre v. Calvert*, (1837) 7 Ad. & El. 143.
- (*i*) *Columbus Co. v. Clowes*, [1903] 1 K. B. 244; cf. *Fray v. Voules*, (1859) 1 E. & E. 839; *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408. *Vide infra*, p. 194.
- (*k*) *Vide supra*, p. 9.

Tort and
contract
contrasted.

It has also been already stated (*l*), that although the principles governing the measure of damages differ somewhat in tort and in contract, there is high authority for the proposition that upon the question of remoteness of damage no distinction exists between tort and contract (*l*). But this can merely signify that any special damage claimed in tort must satisfy the test as to whether it flows, as a natural consequence, or not, from the defendant's wrongful act. That form of damage which may, in the eyes of the law, be a natural consequence of the commission of a tort may, perhaps, not be a natural consequence of a breach of contract. Thus, it is a nearly universal rule that injury to a plaintiff's feelings, credit, or reputation arising from a breach of contract is too remote a form of damage to be recoverable (*m*). On the other hand, in the case of many torts, such as libel, false imprisonment, trespass and assault, general damages, at least, can be given in respect of this form of injury (*n*); and it is to be noted, also, that whereas the motives of the parties are immaterial in breach of contract (*o*), in the class of torts just mentioned the motives and conduct of the parties are highly relevant factors (*p*).

Injury to
credit and
reputation.

But, not only can general damages be given in tort for injury to credit and reputation; special damages, also, if shown to be a natural consequence of the defendant's wrongful act, can, in certain cases, be recovered for duly proved concrete injury to the plaintiff's credit and reputation (*q*).

In dealing with the subject of remoteness of damage in tort, Bowen, L.J., more than once (*r*) expressed the view that the principle of "notice" as applied to contracts and laid down in the second rule of *Hadley v. Baxendale* (*s*) does not apply in tort.

There are, however, of course, many cases (see those appended in footnote (*t*)) in which special damages in tort have been awarded for special loss arising under special circumstances. In some of these cases, the evidence of particular circumstances has been admitted simply with a view to arriving in a general way at

(*l*) *Vide supra*, p. 10.

(*m*) Cf. *Addis v. Gramophone Co.*, [1909] A. C. 488, at p. 491. *Vide supra*, p. 12.

(*n*) *Vide infra*—sections relating to these respective torts.

(*o*) *Vide supra*, p. 14.

(*p*) *Vide infra*—sections relating to these respective torts.

(*q*) *Brewer v. Deu*, (1843) 11 M. & W. 625, at p. 630; *Evans v. Harries*, (1856) 1 H. & N. 251; *Société Française des Asphaltes v. Farrell*, (1885) Cab. & El. 563; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; cf. *Smith v. Enright*, (1893) 69 L. T. 724, at p. 725; *Michael v. Spiers and Pond, Ltd.*, (1909) 25 T. L. R. 740; cf., however, *Nicosia v. Vallone*, (1877) 37 L. T. 106.

(*r*) *The Argentino*, (1888) 13 P. D. 191, at p. 201; *Cobb v. G. W. Ry. Co.*, [1893] 1 Q. B. 459, at p. 464; cf. *France v. Gaudet*, (1871) L. R. 6 Q. B. 199, at pp. 204 and 205.

(*s*) *Vide supra*, p. 11.

(*t*) *Davis v. Oswell*, (1887) 7 C. & P. 804; *Bodley v. Reynolds*, (1846) 8 Q. B. 779; *Wood v. Bell*, (1856) 25 L. J. Q. B. 148; *France v. Gaudet*, (1871) L. R. 6 Q. B. 199.

a reasonable assessment of compensation (*u*)—just as in a case of non-delivery of goods, for which there is no market, evidence of particular facts, such as sub-contracts, may be given for the purpose of valuation, though particular profits might not be recoverable (*x*). In one case, the judges drew a distinction between special damage and special value and seemed to consider that, *e.g.* in a case of conversion, whereas special value could be recovered without the defendant being apprised of such value at the date of his unlawful act, no special damage over and above such value could be recovered without some degree of notice being fixed upon the defendant (*y*).

The question of remoteness of damage in tort can perhaps be best explained in brief by giving two extracts from learned judgments in the same case:—

General principle governing question of remoteness³.

“Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act” (*z*); “the rule as to remoteness of damage does, no doubt, limit the literal application of the rule as to *restitutio in integrum*, yet in my view the two rules are independent, and the first matter for consideration in any particular case is, whether the damage claimed is or is not too remote” (*a*).

There is appended in footnote (*b*) a series of selected cases illustrative of the principles guiding the Court in the determination of the question as to whether any particular or special damage, which has ensued upon the defendant’s wrongful act, is such as might fairly have been anticipated as likely to result from such act, so as to be recoverable in tort.

(*u*) Cf. *The Argentine*, (1888) 13 P. D. 191; *The Mediana*, [1900] A. C. 113. *Vide infra*, p. 296.

(*x*) *Vide infra*, p. 84.

(*y*) *France v. Gaudet*, (1871) L. R. 6 Q. B. 199, at pp. 204, 205.

(*z*) *The Argentine*, (1888) 13 P. D. 191, at p. 201, *per* Bowen, L.J., at pp. 200 and 201.

(*a*) *The Argentine*, (1888) 13 P. D. 191, *per* Lord Esher, M.R., at p. 197.

(*b*) Damages held recoverable: *Scott v. Shepherd*, (1773) 2 Wm. Bl. 892; *Rigby v. Hewitt*, (1850) 5 Exch. 240, at p. 243; *Ellis v. Loftus Iron Co.*, (1874) L. R. 10 C. P. 10; *Sneesby v. L. & Y. Ry. Co.*, (1875) 1 Q. B. D. 42; *Clark v. Chambers*, (1878) 3 Q. B. D. 327; *The Argentine*, (1888) 13 P. D. 191; (1889) 14 App. Cas. 519; *The Mediana*, [1900] A. C. 113; *Dulieu v. White*, [1901] 2 K. B. 669; *Campbell v. Mayor, etc., of Paddington*, [1911] 1 K. B. 869. Damages held too remote: *Crouch v. G. N. Ry. Co.*, (1856) 11 Exch. 742; *Sharp v. Powell*, (1872) L. R. 7 C. P. 253; *Glover v. L. & S. W. Ry. Co.*, (1867) L. R. 3 Q. B. 25; *Nicosia v. Vallone*, (1877) 37 L. T. 106; *Smith v. Johnson* (unreported), see [1901] 2 K. B. at p. 675; *McDowall v. G. W. Ry. Co.*, [1903] 2 K. B. 331; *Speake v. Hughes*, [1904] 1 K. B. 138; *Remorquage à Hélice v. Bennetts*, [1911] 1 K. B. 243; cf. *Burton v. Pinkerton*, (1867) L. R. 2 Exch. 340; *Cator v. Great Western Insurance Co.*, (1873) L. R. 8 C. P. 552; *Cox v. Surbridge*, (1863) 13 C. B. N. S. 430; *Hadwell v. Righton*, [1907] 2 K. B. 345.

From a study of these, and similar, cases, the following rule appears to be deducible:—"Where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act, and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act" (c).

Different meanings of "remoteness."

The question of remoteness of damage in tort may arise in two different forms—at least, superficially different. Thus, the plaintiff may have undoubtedly suffered loss subsequently to the defendant's act, but it may be shown that the defendant was guilty of no breach of duty, and that his act was consequently not unlawful or tortious (d). In this case, the whole of the alleged damage is deemed to be not recoverable, or too remote.

On the other hand, the defendant may have been clearly guilty of a wrongful or tortious act and liable to pay some damages, but he may contend that part or the whole of the special damage claimed is too remote as not being a natural consequence of his act (e).

In this connection, it is important to observe, in the case of the tort of negligence, that even though a defendant may have been in some degree negligent, he is not necessarily liable for all or any loss thereafter resulting, if such loss or damage could not have been reasonably anticipated as a probable consequence of such negligence (f).

Intervening act of third party.

In fact, it may be laid down, as a general rule in all forms of tort, that the spontaneous intervention of an independent volition either on the part of the plaintiff (g), or his servants (h), or of a third party (i), may suffice to break the chain of causation between the defendant's original wrongful act and the damage suffered by the plaintiff.

(c) *In re London, Tilbury, etc., Ry. Co.*, (1889) 24 Q. B. D. 326, *per* Lord Esher, M.R., at p. 329.

(d) Cf. *Holmes v. Mather*, (1875) L. R. 10 Ex. 261; *Manzoni v. Douglas*, (1880) 6 Q. B. D. 145; *Stanley v. Powell*, [1891] 1 Q. B. 86. *Vide infra*, p. 194.

(e) Cf. *France v. Gaudel*, (1871) L. R. 6 Q. B. 199; *The Argentino*, (1888) 13 P. D. 191; *The Mediana*, [1900] A. C. 113. In the case of *Remorquage à Helice v. Bennetts*, [1911] 1 K. B. 243, since the action was not maintainable without proof of some special damage and none was proved, the defendant's act cannot be said to have been tortious (*vide infra*, p. 194.)

(f) Cf. *Rigby v. Hewitt*, (1850) 5 Exch. 240, at p. 243; *Greenland v. Chaplin*, *ubi supra*, at p. 243; *Sharp v. Powell*, (1872) L. R. 7 C. P. 253; *Cory and Son, Ltd. v. France, Fenwick & Co.*, [1911] 1 K. B. 114, at p. 122; *Remorquage à Helice v. Bennetts*, [1911] 1 K. B. 243; cf., however, *Cayzer v. Carron Co.*, (1884) 9 App. Cas. 873, *per* Lord Blackburn, at p. 881.

(g) *Glover v. L. & S. W. Ry. Co.*, (1867) L. R. 3 Q. B. 25; cf. *Ansett v. Marshall*, (1853) 22 L. J. Q. B. 118; *Jones v. Watney, Combe, Reid & Co.*, (1912) 28 T. L. R. 399.

(h) *The Flying Fish*, (1865) 34 L. J. Adm. 113.

(i) *Scholes v. North London Ry. Co.*, (1870) 21 L. T. 835; *Lock v. Ashton*, (1848) 12 Q. B. 871; *Pounder v. N. E. Ry. Co.*, [1892] 1 Q. B. 385; *Cobb v. G. W. Ry. Co.*, [1894] A. C. 419; cf. *Kelly v. Partington*, (1833) 5 B. & Ad. 645; *Lynch v. Knight*, (1861) 9 H. L. C. 577; *Michael v. Spiers and Pond. Ltd.*, (1909) 25 T. L. R. 740.

But it is a question of fact to be decided in each case whether the original wrongful act was the effective cause of the ultimate damage, and the fact that a part or even the whole of the plaintiff's damage arose through the act of third parties will not render such damage too remote, provided such conduct on their part was a reasonable consequence of the defendant's original wrongful act (*k*).

Effective cause of ultimate damage.

Furthermore, where the plaintiff has suffered damage, partly as a result of the defendant's original wrongful act, and partly as a result of a third party's supervening negligence or wrongful act, the plaintiff may recover damages, in proper circumstances, from the defendant (*l*), and the fact of his possibly having a cause of action against the third party will not estop him (*m*).

Damage caused by more than one possible defendant.

If, through the wrongful act of the defendant, the plaintiff is so placed that he must choose a "perilous alternative," and, in such dilemma, he choose the lesser of two risks, he may recover the damages resulting (*n*).

"Perilous alternative."

In actions for personal injuries arising through negligence, mere mental fright or shock is too remote a form of damage to be recoverable (*o*), but if the fright or shock produce physical injury to health and consequent disability, damages may be recovered, even though the plaintiff did not receive any actual physical impact (*o*).

Injury by fright.

In tort, as in contract (*p*), the plaintiff is under a duty to take all reasonable precautions to mitigate the loss arising from the defendant's wrongful act (*p*), and damage, therefore, which the plaintiff could, with the exercise of reasonable prudence, have averted, will be deemed too remote to be recoverable by action (*p*).

Mitigation of loss.

Damages and costs incurred in other proceedings necessitated through the defendant's wrongful act may, in proper cases, be recovered (*q*).

Costs of other proceedings.

In cases of joint tort each tortfeasor is liable for the entire damage inflicted (*r*). The question as to the assessment of damages against two or more joint tortfeasors is dealt with in a

Joint tortfeasors.

(*k*) *Engelhart v. Farrant*, [1897] 1 Q. B. 240; cf. *Knight v. Gibbs*, (1834) 1 Ad. & El. 43; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

(*l*) *Clark v. Chambers*, (1878) 3 Q. B. D. 327; *The Bernina*, (1888) 13 App. Cas. 1; *Baker v. Snell*, [1908] 2 K. B. 825; cf. *Speake v. Hughes*, [1904] 1 K. B. 138.

(*m*) *Bowen v. Hall*, (1881) 6 Q. B. D. 333; *De La Bere v. Pearson, Ltd.*, [1908] 1 K. B. 280; *Baker v. Snell*, *ubi supra*. *Vide infra*, p. 204.

(*n*) *Jones v. Boyce*, (1816) 1 Stark. 493; *The Highland Loch*, [1912] A. C. 312; cf. *Boyce v. Bayliffe*, (1807) 1 Camp. 58.

(*o*) *Dulieu v. White*, [1901] 2 K. B. 669; *Gilligan v. Robb*, (1910) S. C. 856; cf. *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *The Rigel*, [1912] P. 99. *Vide infra*, p. 195.

(*p*) *Vide supra*, p. 13; cf. *Lodge Holes Colliery Co. v. Wednesbury Corporation*, [1908] A. C. 323, at p. 326; *Jones v. Watney, Combe, Reid & Co.*, (1912) 28 T. L. R. 399.

(*q*) *Foxall v. Barnett*, (1853) 2 E. & B. 928; *Bentley Bros. v. Metcalfe & Co.*, [1906] 2 K. B. 548. *Vide infra*, Chap. 12, p. 306.

(*r*) *Hulme v. Oldacre*, (1816) 1 Stark. 352; cf., however, *Harrington v. Derby Corporation*, [1905] 1 Ch. 205.

subsequent chapter(s). Here, it may be observed that a principal is not responsible for the malice of his agent, so as to be liable to vindictive damages, though he may be responsible for the wrongful acts committed by the agent, who was, in fact, actuated by malice (*t*).

*Period with Reference to which Damages are calculated—
Aggravation and Reduction of Damages.*

Finality of
assessment of
damages.

Where a plaintiff sues in respect of a tort or breach of contract which entitles him only to one cause of action, that is to say, where he sues in respect of an injury in which repeated successive causes of action do not accrue (*u*), the damages resulting and recoverable by him must be assessed by the jury once and for all (*x*), however difficult an accurate assessment may be. In other words, when a cause of action has been tried and becomes *res judicata*, the damages awarded—if any—are deemed to comprise compensation for all loss arising thereunder—past, present, future, and contingent (*x*).

Different
causes of
action arising
out of the
same act.

In such a case no further action can be brought for alleged subsequent damage (*x*); but, where the same act constitutes an infringement of two or more separate rights, separate or subsequent actions may be brought, provided that in the first action the plaintiff has not alleged, and sued in respect of, all his causes of action (*y*).

Where
successive
causes of
action do and
do not accrue.

It is necessary, however, to bear in mind the distinction in cases of tort between those cases where one cause of action gives rise to a claim for retrospective and prospective damage (*u*), *e.g.*, where one act of trespass has been committed and damage has been done which may entail future loss, and those cases in which the cause of action merely arises when damage is sustained, that is to say where the damage is the gist of the action, *e.g.*, slander not actionable *per se* (*z*), or subsidence of land due to withdrawal of support (*a*). In these latter cases, fresh causes of action accrue with each fresh instalment of damage (*a*), and therefore in such cases prospective damages cannot be awarded (*b*).

(*s*) *Vide* Chap. 12, at pp. 299, 300.

(*t*) *Carmichael v. Waterford and Limerick Ry. Co.*, (1849) 13 Ir. L. R. 313; *Black v. North British Ry. Co.*, (1908) S. C. 444, *per* the Lord President; *cf. Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423; *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; *cf. also Robertson v. Wylde*, (1838) 2 Moo. & Rob. 101.

(*u*) *Cf. Clegg v. Dearden*, (1848) 12 Q. B. 576; *Spoor v. Green*, (1874) L. R. 9 Ex. 99.

(*x*) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, at pp. 132 and 133 and 144 and 145; *Gibbs v. Cruikshank*, (1873) L. R. 8 C. P. 454, at p. 460; *Furness, Withy & Co. v. Hall*, (1909) 25 T. L. R. 233; *cf. Lee v. L. & Y. Ry. Co.*, (1871) 6 Ch. App. 527.

(*y*) *Brunsdon v. Humphrey*, (1884) 14 Q. B. D. 141; *cf. Gibbs v. Cruikshank* (1873) L. R. 8 C. P. 454.

(*z*) *Vide infra*, at p. 198.

(*a*) *Cf. Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127; *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503.

(*b*) *West Leigh Colliery Co. v. Tunncliffe and Hampson*, [1908] A. C. 27.

Where damages are claimed in respect of a continuing cause of action (c), they may be assessed, by virtue of Ord. XXXVI., r. 58, R. S. C., down to the date of assessment. But for this latter express provision, they could only be assessed down to the date of the writ (d), that is to say, damages incurred subsequently to the issue of the writ could not be claimed as special damage.

Continuing cause of action.

Subject to this last-mentioned exception, it may be stated that no claim for damages can be made in respect of a cause of action accruing subsequently to the date of the writ.

Consequently, since the cause of action must have vested in the plaintiff at the date of the issue of the writ, the calculation or assessment of damages must be based upon the existence of facts constituting the cause of action prior to, or at the date of, such issue of the writ. The important question hereupon arises as to what extent—if any—subsequent facts, or matters subsequently arising, are admissible in evidence for the purpose of regulating the assessment. In tort, subsequent relevant matters are clearly admissible, as affecting general damages (e), and consequential special damage resulting from the defendant's wrongful act can, of course, be recovered (f); subject always to the provision that matters cannot be tendered in evidence to substantiate a claim of special damage if the special damage has not been pleaded (g), nor can matter, which if pleaded would have gone in bar of the action, be given in evidence to reduce damages, unless pleaded (h). In contract, evidence of relevant subsequent matters may be admissible as bearing upon the assessment of the amount of damages recoverable, subject always to the provision that the original liability to pay some damages cannot be affected by a subsequent alleged breach on the part of the plaintiff (i).

Relevancy of matters arising subsequently to the initial cause of action.

Pleas of any matter of defence, such as a release, bankruptcy, etc., arising since the commencement of an action, are allowed (k), provided that the pleading expressly states that "the subject-matter of defence arose after the commencement of the action" (l). But a defence admitting a breach of contract, and pleading performance after action brought and payment into court, is not within this latter rule (m).

Furthermore, the rule applies to defences proper, not to

(c) Cf. *Hole v. Chard Union*, [1894] 1 Ch. 293; *Harrington (Earl of) v. Derby Corporation*, [1905] 1 Ch. 205; *De Soysa v. De Pless Pol*, [1912] A. C. 194.

(d) *Fetter v. Beale*, (1701) 1 Salk. 11; *Battishill v. Reed*, (1856) 18 C. B. 696.

(e) *Vide*, pp. 201, 202, 217.

(f) *In re London, Tilbury and Southend Ry. Co.*, (1889) 24 Q. B. D. 326, *per Lord Esher*, at p. 329.

(g) *Vide*, pp. 293—295.

(h) *Watt v. Watt*, [1905] A. C. 115, at p. 118.

(i) *Bartlett v. Holmes*, (1853) 13 C. B. 630, *per Jervis, C.J.*, at p. 638.

(k) R. S. C., Ord. XXIV., r. 1.

(l) Cf. *Ellis v. Munson*, (1876) 35 L. T. 585.

(m) *Callander v. Hawkins*, (1877) 2 C. P. D. 592.

matters which should properly be raised by way of counterclaim (*n*). Of course, a claim which the defendant has acquired since the commencement of the action can be set up by way of counterclaim (*o*), but the defendant cannot, by way of reducing damages, give evidence of matters which can properly go merely to establish a counterclaim (*p*).

It is stated in *Mayne on Damages* (*q*) that matter arising subsequently to the cause of action is no ground for reducing damages in contract, and certain cases (*r*) are quoted in support of that proposition. It is strongly submitted that this statement, although partially true, is misleading when thus baldly stated. Thus, in a case where, upon repudiation of a contract by the defendant, it is rescinded before the date fixed for its performance, it has been laid down that the contract will be regarded by the court as rescinded for the purpose of suing upon it and as subsisting for the purpose of calculating the damages (*s*).

Similarly, in an action brought by a servant for wrongful dismissal from an employment of specified duration, the plaintiff is deemed to have been under an obligation after his dismissal to try and diminish his loss by securing another situation (*t*), and if it can be shown that immediately after the dismissal the servant obtained a situation as good as or better than his former one, such evidence might serve to reduce the damages to a nominal sum (*t*). In such a case it is expressly stated in *Mayne on Damages* at p. 274 that "the jury, in assessing the damages, would be justified at looking at all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

Again, it has been held that where a landlord, upon breach of a covenant to build, has re-entered and made a fresh and more remunerative lease with a third party, the fact of an increased rent having been actually secured may serve to diminish the damages recoverable for breach of the covenant to build (*u*). Conversely, if, after a breach by the defendant and after re-entry

(*n*) *Beddall v. Maitland*, (1881) 17 Ch. D. 174, *per* Fry, J., at p. 181.

(*o*) *Beddall v. Maitland*, (1881) 17 Ch. D. 174; *Wood v. Goodwin*, [1884] W. N. 17; cf. *Ellis v. Munson*, (1876), 35 L. T. 585.

(*p*) *Mondel v. Steel*, (1841) 8 M. & W. 856, at p. 872; *Francis v. Baker*, (1839) 10 A. & E. 642. See *Sale of Goods Act*, 1893, s. 53.

(*q*) 8th ed., at p. 136.

(*r*) *Hill v. Smith*, (1844) 12 M. & W. 618; *Alder v. Keighley*, (1846) 15 M. & W. 117, at p. 120.

(*s*) Cf. *Frost v. Knight*, (1872) L. R. 7 Ex. 111, at pp. 114-116; cf. also *Davis v. Garrett*, (1830) 6 Bing. 716, at p. 724. Another striking case to the same effect is *Batten v. Wedgwood Coal and Iron Co.*, (1886) 31 Ch. D. 346.

(*t*) Cf. *Hochster v. De La Tour*, (1853) 2 E. & B. 678, at p. 691; *Hartland v. General Exchange Bank*, (1866) 14 L. T. 863, *per* Willes, J.; *Reid v. Explosives Co.*, (1887) 19 Q. B. D. 264, at p. 269; *Brace v. Calder*, [1895] 2 Q. B. 253.

(*u*) *Oldershaw v. Holt*, (1840) 12 A. & E. 590; cf. *Wigsell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357.

by the landlord, the latter is compelled to accept a less rent from a fresh lessee, such fact may serve to enhance the damages (*x*).

On a previous page, Mayne on Damages (*y*) states that "general evidence of matter accruing subsequently to the action may be used for the purpose of showing what was the natural and probable result of the defendant's conduct; but particular facts are not admissible as a specific ground of damage to be atoned for on their own account." If this means that particular facts cannot give rise to a claim for damage unless the loss is consequential upon the original cause of action, doubtless it is strictly true; but it is submitted that it ought not to be taken to mean that evidence of subsequent special damage, or of subsequent facts minimising the plaintiff's loss, is inadmissible, even provided all rules as to special pleading are complied with.

On the other hand, of course, purely collateral matters, whether subsequent or not, are irrelevant and inadmissible as affecting damages (*z*), even although such matters may superficially appear to have a direct relation to the question of damages (*z*); and, of course, evidence as to damage which is not directly consequential is inadmissible (*a*), even though such damage may arise subsequently to and in a sense be due to the original breach of contract.

Collateral matters inadmissible as affecting damages.

The conclusion to be arrived at is that where a contract is broken the cause of action at once accrues. The plaintiff may immediately sue for damages, and the measure of damages must be assessed as being the loss or injury sustained at the date of the breach of contract. But, for the purpose of estimating the present loss, probable future events must be considered (*b*), and if the bringing of the action be delayed, evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given.

In the case of certain torts, such as libel and slander and seduction, the plaintiff's general character is a material factor governing the measure of damages recoverable (*c*), as it also is in actions for breach of promise of marriage (*d*).

Evidence of character as affecting damages.

(*x*) *Marshall v. Mackintosh*, (1898) 78 L. T. 750, *per* Kennedy, J., at p. 752.

(*y*) 8th ed., at p. 128.

(*z*) *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772; *Clow v. Brogden*, (1840) 2 M. & Gr. 39, *per* Tindal, C.J.; *Hill v. Smith*, (1844) 12 M. & W. 618; *Bradburn v. G. W. Ry. Co.*, (1874) L. R. 10 Ex. 1; *Jebsen v. East and West India Dock Co.*, (1875) L. R. 10 C. P. 300; *Morgan v. Hardy*, (1886) 17 Q. B. D. 770, reversed on another point, (1888) 13 App. Cas. 351; *Cohen v. Kittell*, (1889) 22 Q. B. D. 680, *per* Huddleston, B., at p. 683; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *cf.*, however, *Sayers v. Collyer*, (1883) 24 Ch. D. 180; *Columbus Co. v. Clowes*, [1903] 1 K. B. 244.

(*a*) 2 Wms. Saund. 170; 2 Wms. Notes to Saund. 491; *Bostock v. Nicholson*, [1904] 1 K. B. 725, at p. 742. *Vide supra*, p. 10.

(*b*) *Richardson v. Mellish*, (1824) 2 Bing. 229; *cf.* *Chaplin v. Hicks*, [1911] 2 K. B. 786.

(*c*) *Vide infra*, pp. 201, 202.

(*d*) *Vide infra*, p. 207.

In the case of other torts, such as malicious prosecution, false imprisonment, and assault, there is authority—though not unanimous—for the proposition that evidence of general good or bad character is admissible for the purpose of aggravating or diminishing damages (*e*), subject, however, to the rule which applies in all cases, namely, that evidence of general good character is not admissible unless the defendant has previously offered proof of general bad character (*f*).

The question of the plaintiff's character is, of course, wholly immaterial in actions for breach of contract (*g*), with the exception of breach of promise of marriage.

SECTION II.

Liquidated Damages or Penalty.

In certain forms of contract, a provision is inserted to the effect that, in the case of one or other of the parties committing a breach of the contract, he shall be mulcted to the extent of a certain specified or calculable amount. Such amount may be referred to in the contract as a "penalty," or as "liquidated damages," or merely as "damages." The descriptive term, employed by the parties, to the amount payable on default, is not conclusive as to the actual nature, in law, of such amount; but, where the term "penalty" is used, the onus of proof lies on those who seek to show that such amount is, in reality, payable as "liquidated damages" (*h*).

Penalty not recoverable.

The importance of the distinction between a penalty and an amount payable as liquidated damages arises from the fact that, in equity, a penalty for breach of contract cannot be recovered (*i*), whereas liquidated damages are not only recoverable, but the

(*e*) Taylor on Evidence (10th ed.), Vol. I., at p. 277; Stephen on Evidence (7th ed.), art. 57; cf. Powell on Evidence (9th ed.), at p. 136; *Jones v. Stevens*, (1822) 11 Price, 235; *Downing v. Butcher*, (1841) 2 M. & Rob. 374.

(*f*) *Cornwall v. Richardson*, (1825) Ry. & M. 305.

(*g*) *Vide supra*, p. 14. In Stephen's Digest of the Law of Evidence (7th ed.), art. 57, it states that evidence of the plaintiff's character is admissible in "civil cases." This is, surely, too wide a statement. Probably the author means in "certain torts," and in breach of promise of marriage.

(*h*) *Willson v. Love*, [1896] 1 Q. B. 626, at pp. 629 and 630; cf. *Kemble v. Farren*, (1829) 6 Bing. 141, at p. 149; *Betts v. Burch*, (1859) 4 H. & N. 506, at p. 511; *Sparrow v. Paris*, (1862) 7 H. & N. 594; *Bonsall v. Byrne*, (1867) Ir. R. I. C. L. 573; *Parfitt v. Chambré*, (1872) L. R. 15 Eq. 36; *Re White and Arthur*, (1901) 84 L. T. 594; *Diestal v. Stevenson*, [1906] 2 K. B. 345.

(*i*) *Lowe v. Peers*, (1768) 4 Burr. 2225, at pp. 2228 and 2229; *Kemble v. Farren*, (1829) 6 Bing. 141, at p. 148; *Thompson v. Hudson*, (1869) L. R. 4 H. L. 1, at p. 15; *Magee v. Lavelle*, (1874) L. R. 9 C. P. 107; Stat. (1696) 8 & 9 Will. 3, c. 11; cf. *Elphinstone (Lord) v. Monkland Iron and Coal Co.*, (1886) 11 App. Cas. 332, at p. 348.

amount specified as such determines the precise sum which can be awarded by way of damages by the court (*j*).

Where a sum is payable as a punishment for a default, or by way of security, and the realisation of that sum is not within the original intention of the parties, or, in other words, where a sum payable on default does not purport to be an accurate prior assessment of possible foreshadowed loss, such sum is a penalty (*k*). On the other hand, where a sum payable on default purports to be a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation," such sum may be deemed to constitute liquidated damages (*l*).

Distinction between penalty and liquidated damages.

It would appear that in cases where the intention of the parties as to the nature of a breach clause in a contract is in doubt, there is a presumption that a penalty is intended to be imposed, rather than an assessment of liquidated damages (*m*).

The construction of such a clause is a question of law for the judge to determine (*n*).

As has already been stated, the intention of the parties is not necessarily conclusively determined by the actual phraseology employed (*o*), and the surrounding circumstances may, and in proper cases should, be considered for the purpose of ascertaining such intention (*p*).

Descriptive term not conclusive.

Upon the decided cases, it is possible to frame certain rules which may serve as a guide in distinguishing between a penalty and liquidated damages. Thus, (1) where a contract contains a condition for payment of a sum of money to secure the performance of several stipulations of varying degrees of importance, and for breach of some of which the damages might be deemed to be liquidated but for others unliquidated, such sum is, *primâ*

Method of distinguishing.

(*j*) *Lowe v. Peers*, (1768) 4 Burr. 2225, at p. 2229; *Farrant v. Olmius*, (1820) 3 B. & Ald. 692; *Public Works Commissioner v. Hills*, [1906] A. C. 368, at p. 375; cf. *Crisdee v. Bolton*, (1827) 3 C. & P. 240; *Hurst v. Hurst*, (1849) 4 Exch. 571; *Leigh v. Lillie* (1860) 6 H. & N. 165; *Lea v. Whitaker*, (1872) L. R. 8 C. P. 70, at p. 73; *Strickland v. Williams*, [1899] 1 Q. B. 382; cf. also *Weston v. Managers of Metropolitan Asylum*, (1882) 9 Q. B. D. 404.

(*k*) *Lowe v. Peers*, *ubi supra*, at p. 2229; *Kemble v. Farren*, (1829) 6 Bing. 141, at p. 148; *Protector Loan Co. v. Grice*, (1880) 5 Q. B. D. 592, *per* Bramwell, L.J., at p. 596; *Ex parte Burden*, (1881) 16 Ch. D. 675, at p. 680; *Public Works Commissioner v. Hills*, [1906] A. C. 368.

(*l*) *Crisdee v. Bolton*, (1827) 3 C. & P. 240, at p. 243; *Reynolds v. Bridge*, (1856) 6 E. & B. 528; *Law v. Redditch Local Board*, [1892] 1 Q. B. 127; *Clydebank Engineering Co. v. Don José Castaneda*, [1905] A. C. 6; *Webster v. Bosanquet*, [1912] A. C. 394.

(*m*) Cf. *Barton v. Glover*, (1815) Holt, N. P. 43; *Crisdee v. Bolton*, (1827) 3 C. & P. 240, at p. 243.

(*n*) *Sainter v. Ferguson*, (1849) 7 C. B. 716, at p. 727; *Willson v. Love*, [1896] 1 Q. B. 625, at p. 629.

(*o*) *Vide supra*, p. 24.

(*p*) Cf. *Green v. Price*, (1845) 13 M. & W. 695, *per* Parke, B., at p. 701; *Sainter v. Ferguson*, (1849) 7 C. B. 716, at p. 728; *Dimech v. Corlett*, (1858) 12 Moo. P. C. 199 at p. 229; *Strickland v. Williams*, [1899] 1 Q. B. 382, at p. 384; *Pye v. British Automobile Syndicate, Ltd.*, [1906] 1 K. B. 425, *per* Bigham, J., at p. 430; *Webster v. Bosanquet*, [1912] A. C. 394.

facie, a penalty, and not liquidated damages (*q*). (2) Where, however, the damage resulting from a breach of contract is altogether uncertain, and yet a definite sum of money, reasonable in amount, is expressly made payable in respect of it, by way of liquidated damages, such provision is not to be construed to import a penalty (*r*). (3) Where it is provided that, upon the non-payment of a certain sum of money, a larger sum shall thereupon become forthwith payable, the latter is deemed to be a penalty (*s*).

Where an agreement has been broken, but the court relieves the defendant from the payment of what is held to be a penalty, it will direct the jury to assess the measure of damage actually sustained (*t*).

Liquidated damages and injunction not both obtainable.

Liquidated damages for the breach of an agreement cannot be recovered in addition to the obtaining of an injunction (*u*). The plaintiff must elect which alternative remedy he will pursue (*u*).

SECTION III.

Interest.

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The subject of interest, recoverable in actions for damages, is briefly mentioned in the various subsequent chapters of this book which deal with particular causes of action. It is proposed in this section to present a general survey, in summary form, of the subject of interest as a whole.

Interest may—broadly speaking—be said to be recoverable in one of two ways, namely, by statute or at common law; and these two methods of claiming interest will be treated separately. But it is to be borne in mind that one most important statutory provision with regard to interest, namely, s. 28 of the Law

(*q*) *Willson v. Love*, [1896] 1 Q. B. 626; cf. *Davies v. Penton*, (1827) 6 B. & C. 216, at p. 223; *Kemble v. Farren*, (1829) 6 Bing. 141, at p. 148; *Green v. Price*, (1845) 13 M. & W. 695, per Alderson, B., at pp. 701 and 702; *Magee v. Lavell*, (1874) L. R. 9 C. P. 107, at p. 111; *Elphinstone (Lord) v. Monkland Iron and Coal Co.*, (1886) 11 App. Cas. 332, at p. 342; cf., however, *Wallis v. Smith*, (1882) 21 Ch. D. 243, at p. 258.

(*r*) *Green v. Price*, *ubi supra*, per Alderson, B., at p. 702; *Webster v. Bosanquet*, [1912] A. C. 394; cf. *Atkins v. Kinnier*, (1850) 4 Exch. 776, at p. 783; *Galsworthy v. Strutt*, (1848) 1 Exch. 659; *Reynolds v. Bridge*, (1856) 6 E. & B. 528; *Strickland v. Williams*, [1899] 1 Q. B. 382; *Pye v. British Automobile Syndicate, Ltd.*, [1906] 1 K. B. 425; *De Soysa v. De Pless Pol*, [1912] A. C. 194.

(*s*) *Astley v. Weldon*, (1801) 2 B. & P. 346, at p. 354; *Kemble v. Farren*, (1829) 6 Bing. 141, at p. 148; *Thompson v. Hudson*, (1869) L. R. 4 H. L. 1, at p. 15; *Law v. Redditch Local Board*, [1892] 1 Q. B. 127, at p. 130.

(*t*) *Kemble v. Farren*, *ubi supra*, at p. 148; *In re Newman*, (1876) 4 Ch. D. 724.

(*u*) *General Accident Insurance Co. v. Noel*, [1902] 1 K. B. 377.

Amendment Act, 1833 (*v*), has been stated to be (*x*) merely declaratory of the law as it existed apart from statute in the year 1833, though this statement is hardly consistent with certain other cases and dicta (*y*). Furthermore, the latter section of the Act of 1833 expressly states that "interest shall be payable in all cases in which it is now payable by law."

Interest at Common Law.

The circumstances under which interest is recoverable at common law are not clearly defined with unvarying unanimity by the existing authorities. Some slight conflict of view exists.

Lord Ellenborough, in a famous case (*z*), stated that interest ought only to be allowed in cases (1) where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, etc.; (2) where there is an express promise to pay interest; (3) where, from the course of dealing between the parties, an intention that interest should be payable may be inferred; (4) where it can be proved that the money has been used and interest has actually been made (*a*).

In a later case (*b*), Lord Ellenborough stated, and the Court confirmed his view, that interest recoverable under the first of the above-mentioned alternatives was only recoverable by virtue of a written instrument, such as a bill of exchange, and that a contract for the sale of goods, even though payment became due under the contract at a fixed date, did not give grounds for a claim for interest.

Lord Ellenborough's statement of the law with regard to interest has been frequently approved (*c*); but, on the other hand, it was severely criticised in 1893 by Lord Herschell, L.C., in the case of *L. C. and D. Ry. v. S. E. Ry.* (*d*), and it was pointed out by him that a somewhat different ruling by Lord Tenterden—the author of the statute of 1833 (*e*)—in the case of *Page v. Newman* (*f*) has been widely followed. In this latter case Lord Tenterden said: "I think we ought not to depart from the long established rule that interest is not due on money secured

Interest only recoverable in particular cases.

(*v*) 3 & 4 Will. 4, c. 42.

(*x*) *Webster v. British Empire Life Co.*, (1880) 15 Ch. D. 169, *per* Thesiger, L.J., at p. 178.

(*y*) Cf. *Attwood v. Taylor*, (1840) 1 M. & Gr. 279, at p. 332; *Harper v. Williams*, (1843) 4 Q. B. 219; *L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120, *per* Lindley, L.J., at p. 142.

(*z*) *De Havilland v. Bowerbank*, (1807) 1 Camp. 50, at p. 51.

(*a*) As to (4), cf. *Walker v. Constable*, (1798) 1 B. & P. 306; *Fruhling v. Schroeder*, (1835) 2 Bing. N. C. 77; *Marsh v. Jones*, (1889) 40 Ch. D. 563.

(*b*) *De Bernales v. Fuller*, (1810) 2 Camp. 429, n., at p. 430.

(*c*) Tidd. Prac. (9th ed.), at pp. 871 and 872; cf. *Ex parte Williams*, (1813) 1 Rose, 399.

(*d*) [1893] A. C. 429.

(*e*) Law Amendment Act (3 & 4 Will. 4, c. 42).

(*f*) (1829) 9 B. & C. 373, at p. 381.

by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied by the usage of trade, as in the case of mercantile instruments.”

Thus, a simple contract debt does not carry interest unless there exist an express or implied agreement that interest shall be paid (*g*). This rule applies to actions for money lent (*h*), and money had and received (*i*).

In short, there is no rule of law that interest is payable upon a sum certain payable at a given day (*k*). In the case of *Higgins v. Sargent* (*l*) Abbott, C.J., said, “interest is allowed by law only upon mercantile securities, or in those cases in which there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances.” This view has been adopted in later cases (*m*).

Implied
agreement to
pay interest.

In a recent case in the Court of Appeal (*n*) it was held that an agreement to pay interest upon yearly accounts between a trader and his customer might be inferred from the course of dealing between the parties. And, indeed, there are many decided cases to the effect that simple, or even compound, interest may be recovered, under an implied agreement, upon accounts between a creditor and debtor, in which the debtor in the course of dealing has acquiesced in a charge for interest being made (*o*). But the acquiescence must be clear and unmistakable (*p*).

Furthermore, even though compound interest may be charged by an established course of dealing in which half-yearly accounts are rendered, such interest cannot be charged upon the last balance due after the ordinary business relationship between the parties has ceased (*q*).

Interest upon
money
wrongfully
exactd.

Again, interest may be recovered, at all events in equity, in claims for money wrongly exacted and retained (*r*), or for money obtained by fraud (*s*).

(*g*) *Rhodes v. Rhodes*, (1860) 29 L. J. Ch. 418.

(*h*) *Page v. Newman*, (1829) 9 B. & C. 378; cf. *Calton v. Bragg*, (1812) 15 East, 223; *Shaw v. Piton*, (1825) 4 B. & C. 715, per Abbott, C.J., at p. 723.

(*i*) *Fruhling v. Schroeder*, (1835) 2 Bing. N. C. 77; cf. *Walker v. Constable*, (1798) 1 B. & P. 306.

(*k*) *Higgins v. Sargent*, (1823) 2 B. & C. 348, per Holroyd, J., at p. 352; cf. *Gordon v. Swan*, (1810) 12 East, 419.

(*l*) *Ubi supra*, at p. 349.

(*m*) *Hill v. South Staffordshire Ry.*, (1874) L. R. 18 Eq. 154, at p. 167.

(*n*) *Willmot v. Gardner, In re Marquis of Anglesey*, [1901] 2 Ch. 548.

(*o*) *Bruce v. Hunter*, (1813) 3 Camp. 467; *Eaton v. Bell*, (1821) 5 B. & Ald. 34; *Mosse v. Salt*, (1863) 32 Beav. 269.

(*p*) *Daniell v. Sinclair*, (1881) 6 App. Cas. 181; cf. *Croskill v. Bower*, (1863) 32 Beav. 86.

(*q*) *Fergusson v. Fyffe*, (1840) 8 Cl. & F. 121; *Barfield v. Loughborough*, (1872) L. R. 8 Ch. 1, at p. 7; cf. *Williamson v. Williamson*, (1869) L. R. 7 Eq. 542.

(*r*) *Sutton v. S. E. Ry.*, (1865) L. R. 1 Ex. 32; cf. *Blogg v. Johnson*, (1867) L. R. 2 Ch. 225, at p. 228; *In re Olympia, Ltd.*, [1898] 2 Ch. 153, at p. 171; Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 17.

(*s*) *Johnson v. Rex*, [1904] A. C. 817, at p. 822.

It is necessary to bear in mind the distinction between interest recoverable under the terms of a contract as part of the debt and interest recoverable as damages for the detention of money (*t*).

Thus, it has been laid down by Lord Selborne that there is no rule of law that, upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied (*u*). And in the same case it was held that upon the principal and interest remaining unpaid on the date fixed for payment, they become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it (*u*). The rate of interest awarded as damages may, or may not, be the same as that specified in the contract.

Distinction between interest recoverable as part of debt and as damages for detention.

In the case of *L. C. and D. Ry. v. S. E. Ry.* (*x*), Bowen, L.J., said, "if the action of the plaintiffs is to be taken as an action for breach of an agreement, the fulfilment of which would have resulted in the ascertainment of a sum capable of carrying interest by the verdict of the jury, either by reason of its being a debt payable at a certain time, or of its becoming payable on demand, in such a case of special damage the interest might be recoverable for breach of the agreement, the fulfilment of which might have resulted in what I have said." In the same case Lindley, L.J., said, "except as altered by the Act 3 & 4 Will. 4, c. 42, the old law as to interest remains. But, notwithstanding this rule against interest, if a person agreed to do something other than pay money, and he broke his agreement, an action for damages would lie against him; and, in estimating those damages, and as part of them, interest might be reckoned on money which would have become payable by him, with interest, if he had not broken his agreement, and thereby prevented the principal falling due. In such cases, whether interest would be given depends upon whether the money, if it had become payable at law, would have borne interest."

Again, interest, as damages, may be claimed in an action on a mortgage deed after the day of default (*y*); but, where a mortgage deed specifies a particular rate of interest up to the date fixed for payment, such interest is of course recoverable as part of the debt, while subsequent interest, if no provision be inserted with

Interest upon mortgage deed.

(*t*) Cf. *Ex parte Williams*, (1813) 1 Rose, 399; *Price v. G. W. Ry.*, (1847) 16 M. & W. 244, *per* Parke, B., at p. 248; *In re Dixon*, [1900] 2 Ch. 561, at p. 582.

(*u*) *Cook v. Fowler*, (1874) L. R. 7 H. L. 27, at p. 37.

(*x*) *L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120, *per* Bowen, L.J., at pp. 146 and 147; also *per* Lindley, L.J., at p. 142.

(*y*) *Price v. G. W. Ry.*, (1847) 16 M. & W. 244, at p. 248.

regard to it, can only be recovered as damages at the current rate (z).

Interest upon deposit.

Interest as damages may also be recovered upon a deposit paid to a defaulting vendor of an estate (a), but such damages are in the nature of special damages for breach of agreement, and interest, as such, upon the deposit is not recoverable (b).

Interest in other cases.

Interest is not recoverable in actions by annuitants for arrears of their annuities (c), nor at common law in actions upon insurance policies (d), nor for work and labour done (e), nor on an account stated (f). But interest would appear to be recoverable upon money payable under an award at a certain time, if demand be duly made (g).

In the case of *Arnott v. Redfern* (h), Best, C.J., stated that "however a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money." Furthermore, in the case of *Eddowes v. Hopkins* (i), Lord Mansfield said, "though by the common law book debts do not of course carry interest . . . in cases of long delay under vexatious and oppressive circumstances, the jury may in their discretion, if they think fit, allow it." Again, in a comparatively recent case (k), where the defendant had entered into an agreement to purchase a mill from the plaintiff, at a proper valuation, and he, in fact, took possession, but refused to pay the purchase-money, the court awarded the plaintiff interest as damages for delay upon the amount of the valuation from the date on which the defendant took possession.

On the other hand, in the case of *L. C. and D. Ry. v. S. E. Ry.* (l), Lord Herschell disapproved the above-cited dicta of Lord Mansfield and Best, C.J.

Debt payable by bill of exchange.

Interest is of course recoverable upon bills of exchange, as has

(z) *In re Roberts*, (1880) 14 Ch. D. 49; cf. *Mellersh v. Brown*, (1890) 45 Ch. D. 225.

(a) *De Bernales v. Wood*, (1812) 3 Camp. 258; *Farquhar v. Farley*, (1817) 7 Taunt. 592.

(b) *Bradshaw v. Bennett*, (1831) 5 C. & P. 48; cf. *Maberley v. Robins*, (1814) 5 Taunt. 625.

(c) *Booth v. Coulton*, (1861) 30 L. J. Ch. 378; cf. *Blogg v. Johnson*, (1867) L. R. 2 Ch. 225.

(d) *Bain v. Case* (1829), 3 C. & P. 496; cf. *Kingston v. McIntosh*, (1808) 1 Camp. 518; *Higgins v. Sargent*, (1823) 2 B. & C. 348. See Statute 3 & 4 Will. 4, c. 42. *Vide infra*, p. 32.

(e) *Milsom v. Hayward*, (1821) 9 Price, 134.

(f) *Chalie v. Duke of York*, (1806) 6 Esp. 45; *Higgins v. Sargent*, (1823) 2 B. & C. 348, at p. 349.

(g) *Churcher v. Stringer*, (1831) 2 B. & Ad. 777; *Johnson v. Durrant*, (1831) 4 C. & P. 327; *Moody v. Squire*, (1843) 7 Jur. 236.

(h) (1826) 3 Bing. 353, at p. 359.

(i) (1780) 1 Dougl. 376, at p. 376.

(k) *Marsh v. Jones*, (1889) 40 Ch. D. 563; cf. *Hilhouse v. Davies*, (1813) 1 M. & S. 169; *Webster v. British Empire Assurance Co.*, (1880) 15 Ch. D. 169.

(l) [1893] A. C. 429.

already been stated, and it would appear that it is equally recoverable in cases where the defendant has agreed to pay a debt by means of a bill or note (*m*). The interest will begin to run from what would have been the date of the maturity of the bill—had such bill in fact been given.

The Bills of Exchange Act, 1882 (*n*), s. 57, which enacts that interest upon a dishonoured bill is recoverable as liquidated damages, will be referred to later (*o*), but it is important to note that interest upon a dishonoured bill does not constitute part of the debt payable, but can be awarded by the court, in its discretion, by way of damages for delay (*p*).

On the other hand, in the case of a penalty bond, interest is payable without an express stipulation to that effect, and such interest constitutes part of the debt, and is not in the nature of damages (*q*). But in the case of a so-called single bond interest does not accrue (*r*). Bonds.

Interest ceases to accrue after the date of a tender of the principal (*s*). Interest not due after tender.

If the principal sum due be of such a kind as to carry interest with it, interest may be claimed in an action up to the date of the writ. In an action upon a negotiable instrument the writ may be specially indorsed with a claim for interest “until payment or judgment” (*t*), since the interest claimed is declared by the Bills of Exchange Act, 1882, to be “deemed to be liquidated damages,” but, in all other cases, the writ, if specially indorsed, should apparently be merely indorsed with a claim for interest up to the date of the writ (*u*), though subsequently accruing interest may, in point of fact, be recovered under a writ so indorsed by virtue of the Rules of the Supreme Court (*x*). Date to which interest may be claimed.

If the defendant wish to pay money into court in an action brought upon an interest-carrying debt, he must pay interest up to the date of the actual payment into court (*y*). Payment into court.

Where interest is payable by virtue of a special contract, the Contract to pay interest abrogated by a judgment.

(*m*) *Marshall v. Poole*, (1810) 13 East, 98; *Rhoades v. Lord Selsey*, (1840) 2 Beav. 359; *Davis v. Smyth*, (1841) 8 M. & W. 399; cf. *Hare v. Rickards*, (1831) 7 Bing. 254, per Tindal, C.J., at p. 256.

(*n*) 45 & 46 Vict. c. 61.

(*o*) *Vide infra*, p. 35.

(*p*) *Ex parte Williams*, (1813) 1 Rose, 399; *Cameron v. Smith*, (1819), 2 B. & Ald. 305, at p. 308; cf. (1880) 15 Ch. D. at p. 176; *Ex parte Charman*, [1887] W. N. 184. *Vide supra*, p. 29.

(*q*) *Cameron v. Smith*, (1819) 2 B. & Ald. 305, at p. 308; *In re Dixon*, [1900] 2 Ch. 561.

(*r*) *Hogan v. Page*, (1798) 1 B. & P. 337; *Foster v. Weston*, (1830) 6 Bing. 709.

(*s*) *Dent v. Dunn*, (1812) 3 Camp. 296.

(*t*) Cf. *London and Universal Bank v. Clancarty*, [1892] 1 Q. B. 689, at p. 695; *Lawrence v. Wilcocks*, [1892] 1 Q. B. 696.

(*u*) Cf. *Sheba Gold Mining Co. v. Trubshawe*, [1892] 1 Q. B. at p. 682.

(*x*) R. S. C., Ord. XIII., r. 3, Ord. 14; *Vide* Odgers on Pleading and Practice (6th ed.), at pp. 50 and 51.

(*y*) *Kidd v. Walker*, (1831) 2 B. & Ad. 705.

interest arising thereunder ceases to accrue after the date of a judgment obtained for the recovery of the principal, since the contract *ipso facto* ceases to exist (*z*).

Current rate
of interest.

There is no fixed rule of law determining what is the current or ordinary or reasonable rate of interest (*a*). The rate commonly allowed by the courts is 5 per cent (*b*), but this rate is not universally given (*c*). In fact, it has been stated by one judge that "the ordinary rule of the Court of Chancery is to allow interest at the rate of 4 per cent." (*d*). Four per cent. is the rate of interest allowable under the Judgments Act, 1838 (*vide infra*, p. 34), upon judgment debts before satisfaction (*e*).

Interest Recoverable by Statute.

There are four important statutes dealing with the recovery of interest.

Law Amend-
ment Act,
1833.

(1) **The Law Amendment Act, 1833** (*f*).—Sections 28 and 29 of this Act provide "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law.

"That the jury on the trial of any issue may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act."

Claim cannot
be specially
indorsed.

A claim for interest under this statute cannot be specially indorsed, since the compliance with the demand lies in the jury's discretion, as does the rate of interest to be awarded, and consequently the damages, if any, are unliquidated (*g*).

(*z*) *Ex parte Fewings*, (1883) 25 Ch. D. 338; cf. *Florence v. Drayson*, (1857) 1 C. B. N. S. 584; cf., however, *Popple v. Sylrester*, (1882) 22 Ch. D. 98.

(*a*) Cf. *Wainwright's Case*, (1889) 62 L. T. 30, at p. 33; *L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120, at pp. 133 and 134.

(*b*) Cf. *Re Roberts*, (1880) 14 Ch. D. 49; *Mellersh v. Brown*, (1890) 45 Ch. D. 225.

(*c*) Cf. *Marsh v. Jones*, (1889) 40 Ch. D. 563; *Karberg's Case*, [1892] 3 Ch. 1.

(*d*) *Cook v. Fowler*, (1874) L. R. 7 H. L. 27, per Lord Hatherley, at p. 37; cf. *In re Hunt*, [1902] 2 Ch. 318, n.

(*e*) See also R. S. C., Ord. XLII., r. 16.

(*f*) 3 & 4 Will. 4, c. 42.

(*g*) Cf. *Elliott v. Roberts*, (1891) 92 L. T. Jo. 78; *Rodway v. Lucas*, (1855) 10

If the plaintiff has claimed the principal sum under a specially indorsed writ, he should apply—having omitted reference to any claim for interest in the writ—for leave to add a claim for interest, should the Master give the defendant leave to defend. If, however, the plaintiff recover judgment under Ord. XIV., R. S. C., he cannot under such judgment recover interest under this statute, although it is true that Ord. XIV. says that the plaintiff may “apply for liberty to enter final judgment for the amount indorsed together with interest.” The interest referred to in these words means such interest as may properly be included in a special indorsement under Ord. III., r. 6, R. S. C. (*Vide* Annual Practice, notes to Ord. XIV.)

In passing, it may be noted that a judge has the same power as a jury to award interest (*h*), and, by virtue of Ord. XXXVI., r. 50, a referee, or master, has the same powers as a judge, under an order of reference.

A claim for interest indorsed on a writ is not a demand in writing within the meaning of the above statute (*i*); nor is a mere notice, on accounts rendered for goods delivered, that interest after a certain date will be charged at a specified rate (*k*). Nor is a written application for a loan until a fixed date, which application is followed by the loan being made, a “written instrument” within the meaning of the statute (*l*), since the written instrument must of itself, apart from extraneous acts, constitute the contract to pay a sum certain at a time certain, independently of possible future contingencies (*m*).

What constitutes a “demand in writing” and a “written instrument.”

A sum is, however, none the less “certain” by reason of computation being necessary to enable the exact amount to be determined (*n*). Instances of what have been held to constitute a sufficient demand and notice are to be found in the cases subjoined in footnote (*o*).

Interest is not payable under this statute unless there has been a wrongful detention of money which the defendant ought properly to have paid (*p*). If the plaintiff make a demand when

Exch. 667; *Ryley v. Master*, [1892] 1 Q. B. 674; *Wilks v. Wood*, [1892] 1 Q. B. 684.

(*h*) *L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120, at p. 146.

(*i*) *Rhymney Ry. Co. v. Rhymney Iron Co.*, (1890) 25 Q. B. D. 146; *Wilks v. Wood*, [1892] 1 Q. B. 684, at p. 687.

(*k*) *Re Edwards*, (1891) 61 L. J. Ch. 22; cf., however, *Re Anglesey (Marquis of)*, [1901] 2 Ch. 548.

(*l*) *Cf. Taylor v. Holt*, (1864) 3 H. & C. 452.

(*m*) *Cf. Harper v. Williams*, (1843) 4 Q. B. 219; *Hill v. South Staffordshire Ry.*, (1874) L. R. 18 Eq. 154; *Merchant Shipping Co. v. Armitage*, (1874) L. R. 9 Q. B. 99; *L. C. & D. Ry. v. S. E. Ry.*, [1893] A. C. 429; cf., however, *In re Horner*, [1896] 2 Ch. 188.

(*n*) *Harper v. Williams*, *ubi supra*, at p. 234.

(*o*) *Edwards v. G. W. Ry.*, (1851) 11 C. B. 588, at p. 650; *Londesborough v. Mowatt*, (1854) 4 E. & B. 1; *In re Overend*, (1867) L. R. 4 Eq. 184; *Geake v. Ross*, (1875) 44 L. J. C. P. 315.

(*p*) *Webster v. British Empire Co.*, (1880) 15 Ch. D. 169; cf. *Hill v. South Staffordshire Ry.*, (1874) L. R. 18 Eq. 154, at p. 170.

he is not duly entitled to claim the money, such demand does not cause interest to accrue (*p*).

Discretion
of jury.

The discretion given to the jury, to award or withhold interest, is an absolute discretion (*q*), as is also, within certain limits, their discretion in fixing what they deem to be the current rate of interest (*r*).

Judgments
Act, 1838.

(2) **The Judgments Act, 1838** (*s*).—Section 17 of this Act provides that every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Section 18 provides that all orders of courts of equity, and all rules of courts of common law, shall have the same effect as judgments. Ord. XLII., r. 24, R. S. C., provides that every order of the Court or a judge, in any cause or matter, may be enforced against all persons bound thereby, in the same manner as a judgment to the same effect.

Furthermore, Ord. XLII., r. 16, R. S. C., provides that interest at the rate of 4*l.* per cent. per annum on the amount of the judgment, and on the allowed costs (*t*), may be recovered from the time when the judgment or order was entered or made, unless there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment or order, in which case execution may be levied for the amount agreed upon.

The rate of interest under a judgment or order is 4*l.* per cent., even though the principal debt, recovered under the judgment, carried interest at a higher or less rate (*u*).

Date of
judgment.

Ord. XLI., r. 3, R. S. C., provides that the entry of a judgment by a court, or judge in court, shall be dated as of the day on which such judgment is pronounced, unless the judge or court shall otherwise order, and the judgment shall take effect from that date: provided that by special leave a judgment may be ante-dated or post-dated (*x*).

Ord. XLI., r. 4, R. S. C., provides that in cases of judgments not pronounced by a court, or judge in court, the entry of judgment shall be dated and take effect as from the day on which the requisite documents are left with the proper officer for the purpose of such entry.

(*p*) See note (*p*), p. 33, *ante*.

(*q*) Cf. *Attwood v. Taylor*, (1840) 1 M. & Gr. 279.

(*r*) *Londesborough v. Mowatt*, (1854) 4 E. & B. 1. *Vide supra*, p. 32.

(*s*) 1 & 2 Vict. c. 110.

(*t*) Cf. *Boswell v. Coaks*, (1887) 57 L. J. Ch. 101; R. S. C., Ord. LXV., r. 1; *Taylor v. Roe*, [1894] 1 Ch. 413; cf., however, *Caudery v. Finnerty*, (1892) 66 L. T. 684.

(*u*) *Ex parte Fewings*, (1883) 25 Ch. D. 338; cf. *Economic Life Assurance Society v. Osborne*, [1902] A. C. 147.

(*x*) Cf. *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, at p. 573; *Ashover Fluor Spar Mines, Ltd. v. Jackson*, [1911] 2 Ch. 355.

Ord. LVIII., r. 19, R. S. C., provides that, on an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed, unless the court or a judge otherwise orders (*y*).

But the power of the court to antedate a judgment should only be invoked under special circumstances (*z*); and, where a judgment is set aside by the Court of Appeal and another judgment substituted, the practice is for the second judgment to be dated as of the order of the Court of Appeal, and interest upon any damages, subsequently recovered or assessed in pursuance of such judgment, runs from such date, unless a contrary order be made.

Ante-dating
of judgment.

Certain other provisions with regard to interest on judgments are to be found in Ord. LV., rr. 62—64, R. S. C.

In cases where, by an erroneous judgment or order of the court, one party has been compelled to pay money or deliver property to another, such party is entitled, upon the reversal of such judgment or order, to be restored as far as possible to his original position. He will, therefore, be entitled to claim interest upon money of which he was thus deprived, during such period as it was in the other party's possession (*a*); but, it is not customary for interest to be allowed upon costs paid under the erroneous judgment (*b*).

Reversal of
erroneous
judgment.

(3) **The Bills of Exchange Act, 1882** (*c*).—Section 57 of this Act provides that interest may be recovered as liquidated damages upon a dishonoured bill—such interest being deemed to run as from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case. Furthermore, where, by this Act, interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest, as damages, may or may not be given, at the same rate as interest proper. Section 9 provides that where a bill is expressed to be payable with interest, unless the instrument provides otherwise, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.

Bills of
Exchange
Act, 1882.

Although, as stated above, interest claimed as damages on a bill or note, under this statute, is deemed to be a liquidated demand, and is consequently recoverable under a specially

(*y*) Cf. *L. & Y. Ry. v. Gidlow*, (1875) L. R. 7 H. L. 517.

(*z*) Cf. *Borthwick v. Elderslie Steamship Co.*, [1905] 2 K. B. 516; *Ashover Fluor Spar Mines, Ltd. v. Jackson*, [1911] 2 Ch. 355.

(*a*) *Merchant Banking Co. v. Maud*, (1874) L. R. 18 Eq. 659; cf. *Karberg's Case*, [1892] 3 Ch. 1.

(*b*) Cf. *Rodger v. Comptoir d'Escompte de Paris*, (1871) L. R. 3 P. C. 465, at pp. 477 and 478.

(*c*) 45 & 46 Vict. c. 61.

indorsed writ (*d*), if the rate of interest claimed be abnormally high, it will invalidate the special indorsement and render the claim unliquidated (*e*).

In claims for interest under this statute, the writ, though specially indorsed, may be indorsed with a demand for interest until payment or judgment (*f*).

In passing, it may be observed that in the case of penalty bonds, coming within the purview of 4 & 5 Anne, c. 16, ss. 12 and 13, interest is payable as interest, and not as damages for non-payment on the date fixed (*g*).

Solicitors Act,
1870.

(4) **The Solicitors Act, 1870** (*h*).—Section 17 of this Act empowers the taxing master to allow interest, at such rate and from such time as appears equitable, on sums disbursed by a solicitor for his client, and to allow a client interest, similarly, on sums belonging to him in the hands of a solicitor, and improperly retained by such solicitor.

Money-
lenders Act,
1900.

In conclusion, it should be noted that under the Money-lenders Act, 1900 (*i*), s. 1, the Court is given power in actions brought by money-lenders, within the meaning of the Act, to set aside, wholly or in part, or alter, any security given, or agreement made, in respect of money lent at what is deemed to constitute an excessive rate of interest, and in other ways to relieve, if necessary, the defendant.

The powers conferred by this act are far-reaching, and relief may be given even though in the contract itself the term “interest” is not used, provided (1) the interest, or other expenses, charged, are excessive, and the transaction is harsh and unconscionable, or (2) the case is one in which a court of equity would grant relief (*i*). But all the circumstances of the case, *e.g.*, the attendant risk to the creditor, are to be considered, and no precise rate of interest can be laid down, in general, as reasonable, though in some cases as much as 50 per cent. has been allowed (*j*).

Relief under this act cannot be given by a judge or master in chambers on an application for judgment under Ord. XIV., R. S. C. (*k*). But, it may apparently be given by a registrar of the Court of Bankruptcy, upon the hearing of a petition for a receiving order, founded on a final judgment recovered in an

(*d*) Cf. *Blood v. Robinson*, (1891) 92 L. T. Jo. 202; *London and Universal Bank v. Clancarty*, [1892] 1 Q. B. 689.

(*e*) Cf. *Elliott v. Roberts*, (1891) 92 L. T. Jo. 78.

(*f*) *London and Universal Bank v. Clancarty*, *ubi supra*.

(*g*) *In re Dixon*, [1900] 2 Ch. 561. *Vide supra*, pp. 29 and 31.

(*h*) 33 & 34 Vict. c. 28.

(*i*) 63 & 64 Vict. c. 51.

(*j*) Cf. *Samuel v. Newbold*, [1906] A. C. 461; *Carringtons, Ltd. v. Smith*, [1906] 1 K. B. 79; *Fortescue v. Bradshaw*, (1911) 27 T. L. R. 251; *Wheatley v. Port*, (1911) 27 T. L. R. 303; *King v. Hay Currie*, (1911) 28 T. L. R. 10.

(*k*) *Wells v. Alott*, [1904] 2 K. B. 842.

action in which the debtor did not apply for relief under the act (*l*).

Where a plaintiff, in a money-lender's action, applies for leave to sign final judgment under Ord. XIV., R. S. C., and the defendant pleads the Money-lenders Act, 1900, but admits that he still owes part of the money actually advanced, the proper order is one for summary judgment for the amount admitted to be due without interest, and leave to defend for the residue of the claim (*m*).

(*l*) *In re a Debtor*, [1903] 1 K. B. 705.

(*m*) *Lazarus v. Smith*, [1908] 2 K. B. 266.

CHAPTER III.

Damages in Relation to Real and Leasehold Property.

- Section I.—Trespass.
" II.—Contracts for the Sale of Real and Leasehold Property.
" III.—Covenants applicable to a Conveyance or a Demise.
" IV.—Leasehold Covenants.
" V.—Recovery of Rent.

In the first two chapters of this book the subject of damages has been treated in a general manner.

In the present and the subsequent eight chapters the law of damages in relation to specific subject-matters is dealt with. It is submitted that this method of treating the law of damages is preferable to a continuous general treatment of the whole subject. Thus, the principles which govern the damages recoverable for breach of a contract relating to land are widely different from those governing the damages recoverable for breach of a contract relating to personal property.

Then, again, a subject such as the carriage of goods presents so many individual features of special application, that the law of damages arising under contracts of carriage can best be treated in a chapter exclusively devoted to it.

The present chapter will be concerned with the law of damages in relation to real property. It will be divided into five sections, and will comprise an examination of the damages recoverable under (I.) trespass and nuisance; (II.) contracts for the sale of real and leasehold property; (III.) covenants applicable to a conveyance or a demise; (IV.) leasehold covenants; (V.) recovery of rent. The last two covenants dealt with in Section (III.) are only applicable to a conveyance.

SECTION I.

Trespass.

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Definition of
trespass.

Trespass of land consists in the wrongful entry upon the land of another. The entry may be either actual or constructive, and it is no defence to show that the trespass was unintentional, though the question of intent may affect the damages (a).

(a) *Merest v. Harvey*, (1814) 5 Taunt. 442.

To maintain an action for trespass the plaintiff must show that he was in actual or constructive possession at the date of the alleged trespass (b).

Factors
requisite for
maintenance
of cause of
action.

If, however, the act of trespass be prejudicial to the reversion of the property, the reversioner, although he has parted with possession, can, none the less, maintain an action for damages in trespass (c).

In this respect, trespass of real property differs from trespass of personal property (d).

A person with a limited right of entry upon certain land may become a trespasser by exceeding his rightful limit (e).

Real property is subject to different estates of ownership. It therefore follows that in a case of trespass to real property several different causes of action may accrue (f).

The measure of damages recoverable is proportionate to the injury done to the respective separate interests (g).

Hence, as is mentioned above, a reversioner can sue in respect of permanent damage, but cannot sue in respect of merely transient damage (h). A person having only an *interesse termini* cannot maintain an action for trespass (i).

In estimating the amount of damages recoverable in respect of trespass to real property regard must be paid not to the calculated expense of restoring it, but to its depreciation in value (k).

Measure of
damages.

In the case of trespass to land caused through the wrongful excavation and removal of minerals therefrom, the measure of damages consists of the value of the minerals at the pit's mouth, less the cost of transport from the place of excavation to the pit's mouth, but without any deduction for the cost of actual severance (l).

Removal of
minerals.

Where, however, the trespasser acts under a *bonâ fide* claim of right, he is entitled to compensation for the cost of such severance (m),

(b) *Baxter v. Taylor*, (1832) 4 B. & Ad. 72.

(c) *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(d) *Vide* Addison on Torts (8th ed.), at p. 578; 2 Roll. Abr. 551; also p. 108 *infra*.

(e) *Hickman v. Maisey*, [1900] 1 Q. B. 752.

(f) *Jefferson v. Jefferson*, (1683) 3 Lev. 130; *Jesser v. Gifford*, (1768) 4 Burr. 2141.

(g) *Johnstone v. Hall*, (1856) 25 L. J. Ch. 462; *Evelyn v. Raddish*, (1817) Holt, N. P. 543.

(h) *Tucker v. Newman*, (1839) 11 Ad. & E. 40; *Mumford v. Oxford, Worcester and Wolverhampton Ry. Co.*, (1856) 1 H. & N. 34; cf. *Rust v. Victoria Graving Dock Co.*, (1886) 36 Ch. D. 113.

(i) *Wallis v. Hands*, [1893] 2 Ch. 75, *per* Chitty, J., at p. 86.

(k) *Jones v. Gooday*, (1841) 8 M. & W. 146; cf. *Dodd v. Holme*, (1834) 1 Ad. & E. 493, *per* Williams, J., at p. 507; *Hide v. Thornborough*, (1846) 2 C. & K. 250; *Hosking v. Phillips*, (1848) 3 Ex. 168, *per* Parke, B., at p. 182.

(l) *Martin v. Porter*, (1839) 5 M. & W. 351, 352, 354; *Morgan v. Powell*, (1842) 3 Q. B. 278; cf. *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 350.

(m) *Wood v. Morewood*, (1841), 3 Q. B. 440, n.; *Wild v. Holt*, (1842) 9 M. & W. 672, *per* Parke B., at p. 673; *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25; *Ashton v. Stock*, (1877) 6 Ch. D. 719.

and in some cases he may, perhaps, even retain a reasonable profit (*n*).

Damages are also separately recoverable in respect of trespass incidentally committed by the defendant in the course of such excavation and removal (*o*).

Wrongful
user.

It is, however, important to note that in cases where such trespass arises from wrongful user of the plaintiff's land, the measure of damages is a reasonable rent for a way-leave (*p*), or a reasonable payment for licence for such user (*q*). In all cases of trespass the trespasser is not permitted to be in a better position than he would have been in, had he first obtained a lawful agreement to allow him to do that which, without an agreement, constituted an act of trespass.

Where subterranean trespass is committed without removal of minerals, the measure of damages, in accordance with the rule stated above (*r*), is the amount of depreciation—not the amount required in order to restore (*s*).

Total depriva-
tion of land.

Where the trespass is of such a kind as to totally deprive the plaintiff of his land, the measure of damages payable to a freeholder entitled to possession is the saleable price of the land (*t*), though, in some cases, the value of the land for the purposes for which it was actually used by the wrong-doer has been deemed a relevant factor in determining the damages payable (*u*).

Continuing
trespass.

Where the trespass committed is of a continuing character and is such that its continuance will give rise to repeated successive causes of action, the damages recoverable are only retrospective—not prospective (*x*). A continuing nuisance is analogous to such form of trespass (*x*). But, in such cases, *i.e.*, where a continuing cause of action exists, damages may be assessed down to the very date of assessment—subsequently to the date of the writ (*y*).

If, however, the plaintiff applies for an injunction to restrain the continuance of an existing nuisance, it would appear that the court may, in proper cases, award damages in lieu of an injunction, and in awarding such damages may compensate the plaintiff

(*n*) Cf. *Att.-Gen. v. Tomline*, (1877) 5 Ch. D. 750; *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25; *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742, 760.

(*o*) *Morgan v. Powell*, (1842) 3 Q. B. 278, *per* Denman, C.J., at p. 284; cf. *Williams v. Raggett*, (1877) 46 L. J. Ch. 849; *Anderson v. Buckton*, (1719) 1 Stra. 192.

(*p*) *Martin v. Porter*, (1839) 5 M. & W. 351; *Phillips v. Homfray*, (1871) L. R. 6 Ch. 770; cf. *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742.

(*q*) *Whitwham v. Westminster Brymbo Co.*, [1896] 1 Ch. 894; *Holmes v. Wilson*, (1839) 10 Ad. & E. 503.

(*r*) *Vide supra*, p. 39.

(*s*) Cf. *Rileys v. Halifax Corporation*, (1907) 97 L. T. 278, *per* Joyce, J., at p. 279.

(*t*) Cf. *McArthur v. Cornwall*, [1892] A. C. 75; *Spencer v. Registrar of Titles*, (1910) 103 L. T. 647.

(*u*) *Whitwham v. Westminster Brymbo Co.*, [1896] 1 Ch. 894.

(*x*) Cf. *Shadwell v. Hutchinson*, (1830) 4 C. & P. 333; *Battishill v. Reed*, (1856) 18 C. B. 696.

(*y*) R. S. C., Ord. XXXVI., r. 58; *Hole v. Chard Union*, [1894] 1 Ch. 293.

for prospective injury (*z*), as well as for past or existing injury (*z*).

Furthermore, in cases which come within the purview of the Lands Clauses Consolidation Act, 1845, compensation, in proper circumstances, may be awarded prospectively for future damage (*a*).

Where the trespass, though causing injury of a continuing nature, is in itself of a single character, arising from one isolated act, it would seem that successive causes of action do not accrue, and that the damages awarded can and should, therefore, be prospective (*b*).

Single
trespass.

In fact, the damages which result from one and the same cause of action must be assessed and recovered once and for all, and will therefore comprise all loss, past, present, future and contingent (*c*).

Where, however, the cause of action arises simply from the damage actually inflicted, *e.g.*, in cases of land subsidence, fresh actions can be brought upon each successive manifestation of fresh damage (*d*), provided the defendant is the person, or is liable for the acts of the person, whose original act caused such successive instalments of damage to accrue (*e*). But, in such cases, risk of future loss or damage must be disregarded (*f*).

Subsidence.

The court may, in proper circumstances, award vindictive damages in an action for trespass to real property (*g*).

Vindictive
damages.

Each one of several co-trespassers is liable for the entire damage done (*h*).

Co-tres-
passers.

Consequential damages, if not too remote, may be recovered in an action for trespass to land (*i*).

Consequential
damages.

Not only may corporeal hereditaments, such as land and buildings, be made the subject of trespass, but also certain incorporeal hereditaments, such as easements and profits. In passing, it may be observed that a reversionary interest in real property

Trespass to
easements.

(*z*) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, *per* Smith, L.J., at p. 319; *Martin v. Price*, [1894] 1 Ch. 276; *Cowper v. Laidler*, [1903] 2 Ch. 337, *per* Buckley, J., at pp. 339 and 340. *Vide infra*, p. 304.

(*a*) *Vide infra*, p. 230.

(*b*) *Clegg v. Dearden*, (1848) 12 Q. B. 576; *Spoor v. Green*, (1874) L. R. 9 Ex. 99; *cf.* *West Leigh Colliery Co., Ltd. v. Tunncliffe and Hampson, Ltd.*, [1908] A. C. 27.

(*c*) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, at pp. 132 and 133; *Furness, Withy & Co. v. Hall*, (1909) 25 T. L. R. 233.

(*d*) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, at p. 145; *Backhouse v. Bonomi*, (1861) 9 H. L. C. 503.

(*e*) *Cf. Greenwell v. Low Beechburn Co.*, [1897] 2 Q. B. 165.

(*f*) *West Leigh Colliery Co., Ltd. v. Tunncliffe and Hampson, Ltd.*, [1908] A. C. 27.

(*g*) *Merest v. Harvey*, (1814) 5 Taunt. 442; *Williams v. Currie*, (1845) 1 C. B. 841; *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, *per* Bowen, L.J., at p. 618; *Davis v. Bromley*, (1903) 67 J. P. 275.

(*h*) *Hulme v. Oldacre*, (1816) 1 Stark. 352; *cf.*, however, *Harrington v. Derby Corporation*, [1905] 1 Ch. 205.

(*i*) *Cf. Crowhurst v. Amersham Burial Board*, (1878) 4 Ex. D. 5; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

constitutes an incorporeal hereditament, and, as has already been seen, a reversionary interest may be made the subject of a trespass. (*Vide supra*, p. 39.)

In the case of easements, an action will lie whenever a right has been infringed, without any proof of special damage (*k*), though the plaintiff may only succeed in obtaining nominal damages.

Since any continued violation of a right to an easement or profit may of itself give rise to a prescriptive right antagonistic to such easement or profit, the courts will protect with meticulous care the rights of owners of this class of property (*l*).

On the other hand, the courts will not interfere unless there has been an unequivocal violation of the owner's right. Thus, in the case of the easement known as right to light, the owner cannot maintain an action for trespass unless the alleged infringement amount in the view of the court to a substantial privation of light (*m*).

Measure of damages.

The measure of damages in the case of trespass to easements varies, as it does in the case of trespass to land (*n*), according as to whether the loss sustained must be estimated purely retrospectively (*o*), or both retrospectively and prospectively (*p*); that is to say, according as to whether there is or is not a continuing cause of action.

Infringement of public right.

Where the right violated is one of a public character, actual damage must be proved. Thus, no one can sue in respect of a public nuisance without showing that he himself has been injured thereby (*q*), and to a substantial extent (*r*).

Mesne profits.

Before leaving the subject of trespass to real property mention must be made of actions in respect of mesne profits. As has already been seen, such an action may be joined in a specially indorsed writ with one for the recovery of land—*vide supra*, p. 5.

In an action for the recovery of mesne profits the measure of damages is the rent and profits which the trespasser has or might have received or made during his occupation of the land or premises. Nevertheless, consequential damage may be recovered, if specially pleaded (*s*).

The defendant is entitled to plead in mitigation of damages

(*k*) *Rochdale Canal Co. v. Radcliffe*, (1852) 18 Q. B. 287.

(*l*) *Northam v. Hurley*, (1853) 1 E. & B. 665; cf. *Embrey v. Owen*, (1851) 6 Exch. 353.

(*m*) *Colls v. Home and Colonial Stores*, [1904] A. C. 179; cf. *Higgins v. Belts*, [1905] 2 Ch. 210.

(*n*) *Vide supra*, pp. 40, 41.

(*o*) *Pennington v. Brinsop Hall Coal Co.*, (1877) 5 Ch. D. 769.

(*p*) *Moore v. Hall*, (1878) 3 Q. B. D. 178.

(*q*) *Wilkes v. Hungerford Market Co.*, (1835) 2 Bing. N. C. 281.

(*r*) *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400.

(*s*) *Dunn v. Large*, (1783) 3 Dougl. 335; cf. *Bramley v. Chesterton*, (1857) 2 C. B. N. S. 592, *per Williams, J.*, at p. 605.

any payments made by him, while in possession, for which the plaintiff would have been liable (*t*).

In cases where no proof is given of the period during which the defendant wrongfully held possession, only nominal damages are recoverable (*u*).

Nuisance.

Nuisances are of two kinds—public and private. A nuisance does not necessarily arise from interference with rights accruing from the ownership of real or leasehold property, but most nuisances do constitute an infringement of such rights. Nuisances—
public and
private.

No person has a private right of action in respect of a public nuisance unless he can show that he has incurred a direct substantial particular injury to himself beyond that suffered by the general public (*x*).

The distinction between nuisances which are wholly private in character, consisting of one person's curtailment of his neighbour's proprietary rights, and trespass, is liable to be lost sight of. In trespass, of course, an action will lie without proof of actual damage; but no action for damages in respect of nuisance will lie without proof of damage. Distinction
between
trespass and
nuisance.

The most usual remedy resorted to in case of nuisance of a continuing character is an injunction. But, an injunction will not be granted where the injury to the plaintiff's legal rights is small, capable of estimation in money and of being adequately compensated for by a small pecuniary payment, and where it would inflict hardship upon the defendant if an injunction were granted (*y*). Injunction.

In such cases damages will be awarded in lieu of an injunction. On the other hand, if the *injuria* be great though the actual *damnum* be small (*z*), an injunction will be granted, as it will also in cases where the granting of it will prevent the necessity of bringing a series of actions in respect of the same subject-matter (*a*). Damages in
lieu of
injunction.

The damages recoverable are, in general, the amount of loss sustained through the injury inflicted by the defendant, but in appropriate circumstances punitive damages may be awarded (*b*). If the nuisance be so great as to compel the plaintiff to incur expense in obtaining fresh premises, such expense could probably Measure of
damages.

(*t*) *Doe v. Hare*, (1833) 2 C. & M. 145; cf. *Cawdor (Earl of) v. Lewis*, (1835) 1 Y. & C. 427.

(*u*) *Ive v. Scott*, (1841) 9 Dowl. 993.

(*x*) *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400, per Brett, J., at p. 407.

(*y*) Cf. *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, per Smith, L.J.

(*z*) Cf. *Allen v. Martin*, (1875) L. R. 20 Eq. 462.

(*a*) *Pennington v. Brinsop Hall Coal Co.*, (1877) 5 Ch. D. 769, per Fry, J.

(*b*) *Bell v. Midland Ry. Co.*, (1861) 10 C. B. N. S. 287, per Willes, J., at p. 307.

be recovered as consequential damages (*c*), and, in one case, loss of profits caused by nuisance was held recoverable as special damage (*d*).

In the case of a continuing nuisance, repeated fresh causes of action accrue, so that the damages must not be prospective (*e*), but it is permissible in such cases, by virtue of Ord. XXXVI., r. 58, R. S. C., to recover damages sustained down to the date of assessment (*f*).

But prospective damages may be awarded for future damage in those cases where an injunction is applied for and the court, in its discretion, decides to award damages in substitution for an injunction (*g*).

Of course, in proper cases, damages may be awarded for past injury, in addition to an injunction being granted to prevent future injury (*f*).

Where no actual wrong has been committed and injury is merely threatened, it is very doubtful whether the Court has any power to give damages in lieu of an injunction (*h*).

SECTION II.

Contracts for the Sale of Real and Leasehold Property.

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Action by Vendee against Vendor for Failure to Convey.

Inability of vendor to make a good title.

Where a contract for the sale of real property has been entered into and the vendor is incapable of making a good title, the intending purchaser cannot recover damages for “the loss of his bargain” (*i*).

This rule applies whether the vendor has or has not been guilty of fraud; though of course it does not affect the purchaser’s right to bring an action at common law for deceit (*k*).

Measure of damages.

The measure of damages recoverable by a purchaser from a vendor who is unable to convey is—

(*c*) Cf. *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836, *per* Lindley, L.J., at p. 840, and *per* Lopes, L.J., at p. 841.
(*d*) *Campbell v. Mayor, etc., of Paddington*, [1911] 1 K. B. 869.
(*e*) *Vide supra*, p. 7.
(*f*) *Hole v. Chard Union*, [1894] 1 Ch. 293.
(*g*) *Vide infra*, p. 304.
(*h*) *Dreyfus v. Peruvian Guano Co.*, (1889) 43 Ch. D. 316; *Cowper v. Laidler*, [1903] 2 Ch. 337, *per* Buckley, J.; cf. *Martin v. Price*, [1894] 1 Ch. 276. *Vide infra*, p. 305.
(*i*) *Flureau v. Thornhill*, (1776) 2 W. Bl. 1078, followed in *Morgan v. Russell and Sons*, [1909] 1 K. B. 357; *Rowe v. School Board for London*, (1887) 36 Ch. D. 619; cf. *Hanslip v. Padwick*, (1850) 5 Exch. 615; *Sikes v. Wild*, (1863) 4 B. & S. 421.
(*k*) *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158, *per* Lord Chelmsford, at p. 207.

- (1) the expenses incurred in investigating the vendor's title (*l*) ;
- (2) return of deposit or premium with interest (*m*) ;
- (3) possibly—the purchaser's costs of drawing up the agreement of sale (*n*).

A deposit is none the less recoverable by reason of the vendee having entered and occupied under the agreement (*o*).

Other incidental expenses which the purchaser may have incurred, such as those of surveying the estate or preparing the conveyance, cannot be recovered (*p*).

If, however, the contract for sale is void in itself, *e.g.*, by reason of the Statute of Frauds, the vendee cannot even recover the expenses of investigating the title, though he may recover the deposit and half the auction money, as money had and received (*q*).

Neither can a vendee recover expenses incurred after the defect in title has been discovered (*r*).

In cases where the vendor has a good title, but refuses to convey, the purchaser, if he does not enforce his right to specific performance (*vide* Chap. XII., Sect. 2), can claim, in addition to the damages enumerated above (*s*), damages for the "loss of his bargain" (*s*). The measure of such damages in these cases is the difference between the contract price and the value of the property at the date of the refusal to convey (*t*). The profit which the purchaser could have made on resale may be accepted by the court as evidence of enhanced value (*u*). (*Vide infra*, p. 84.)

Refusal to convey on the part of vendor with a good title.

Measure of damages.

Furthermore, in cases where the vendor has a good title, but refuses to convey, the purchaser, if he bring an action for specific performance, may recover damages in respect of loss occasioned by the vendor's delay (*x*).

The measure of such damages is the loss "which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the con-

(*l*) *Walker v. Moore*, (1829) 10 B. & C. 416; *Orme v. Broughton*, (1834) 10 Bing. 533.

(*m*) *De Bernales v. Wood*, (1812) 3 Camp. 258; *Roper v. Coombes*, (1827) 6 B. & C. 534; cf. 3 & 4 Will. 4, c. 42, s. 28.

(*n*) *Pearl Life Assurance Co. v. Buttenshaw*, [1893] W. N. 123.

(*o*) *Wright v. Colls*, (1849) 8 C. B. 150.

(*p*) *Hodges v. Earl of Litchfield*, (1835) 1 Bing. N. C. 492; *Hanslip v. Padwick*, (1850) 5 Exch. 615; *Jarmain v. Egelstone*, (1831) 5 C. & P. 172.

(*q*) *Gosbell v. Archer*, (1835) 2 A. & E. 500.

(*r*) *Pounsett v. Fuller*, (1856) 17 C. B. 660; cf. *Sikes v. Wild*, (1863) 4 B. & S. 421.

(*s*) *Engel v. Fitch*, (1869) L. R. 4 Q. B. 659; *Day v. Singleton*, [1899] 2 Ch. 320; *Williams v. Glenton*, (1866) L. R. 1 Ch. 200, *per* Turner, L.J., at p. 209; cf. *Strutt v. Farlar*, (1847) 16 M. & W. 249.

(*t*) *Engel v. Fitch*, *ubi supra*.

(*u*) Cf. *Godwin v. Francis*, (1870) L. R. 5 C. P. 295.

(*x*) *Jones v. Gardiner*, [1902] 1 Ch. 191; *Royal Bristol Building Society v. Bomash*, (1887) 35 Ch. D. 390.

tract" (y). In one case this was deemed to be the rent which the purchaser would have received from a tenant of his own (z). Damages may be recovered even though specific performance be refused (a). Damages for delay cannot be recovered as compensation under the Vendor and Purchaser Act, 1874 (b).

Immaterial whether property be freehold or leasehold.

The same rules as to the measure of damages apply—*exceptis excipiendis*—in actions for failure to convey brought by a purchaser, whether the property be leasehold or freehold (c), and it is important to note that *Robinson v. Harman*, (1848) 1 Exch. 850, and the earlier case of *Hopkins v. Grazebrook*, (1826) 6 B. & C. 31, were both substantially overruled by the decision of the House of Lords in *Bain v. Fothergill* (d).

Remedy in cases where the contract has been executed.

If, however, the contract cease to be executory and become executed (cf. *Lock v. Furze*, (1865) 19 C. B. N. S. 96, *per* Smith, J., at p. 124), as for instance by a conveyance being executed and the plaintiff taking possession, or possibly (though this is doubtful) without such a step as the plaintiff taking possession (e), the plaintiff may be able to recover consequential damages by suing for breach of covenant for quiet enjoyment (*Lock v. Furze*, *ubi supra*). Or, the plaintiff may recover consequential damages by suing for breach of covenant for title (f), provided the conveyance transferred some actual interest (*vide infra*, pp. 52, 53). In fact, if the vendor's title be actually transferred to the vendee, or if the vendee has taken possession, the latter's remedy for defective title can apparently only be an action for breach of covenant (e).

Contract to secure a title.

There is one important exception to the general rule that no consequential damages can be recovered in the case of contracts for the sale of land which are rendered abortive by reason of defect in the vendor's title. If it appears on the face of the agreement that the defendant has no title at all, but merely undertakes to obtain a title and then convey it, and the plaintiff in pursuance of the agreement confers substantial and permanent benefit upon the defendant, the plaintiff is entitled to such damages as will place him in as good a position as if the whole contract had been duly performed (g).

(y) *Jaques v. Millar*, (1877) 6 Ch. D. 153, *per* Fry, J., at p. 160.

(z) *Royal Bristol Building Society v. Bomash*, (1887) 35 Ch. D. 390.

(a) *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

(b) *In re Wilson's and Stevens' Contract*, [1894] 3 Ch. 546.

(c) See Foa's Law of Landlord and Tenant (4th ed.), at pp. 388 and 389; cf. *Gas Light, etc., Co. v. Towse*, (1887) 35 Ch. D. 519.

(d) (1874) L. R. 7 H. L. 158.

(e) *Blackburn v. Smith*, (1848) 2 Exch. 783; *Johnson v. Johnson*, (1802) 3 B. & P. 162, *per* Lord Alvanley, at p. 170; cf. *Jenkins v. Jones*, (1882) 9 Q. B. D. 128.

(f) As to the implication in a lease of covenants for quiet enjoyment or title, *vide Baynes v. Lloyd*, [1895] 1 Q. B. 820; *Jones v. Lavington*, [1903] 1 K. B. 253; *Markham v. Paget*, [1908] 1 Ch. 697.

(g) *Wall v. City of London Real Property Co.*, (1874) L. R. 9 Q. B. 249, *per* Blackburn, J., at p. 252.

But, if a vendor fails, by the date specified in the agreement of sale, to establish a good title, the vendee may repudiate the agreement and recover his purchase-money or deposit—if already paid (*h*)—even though the vendor subsequently establish a title sufficient to claim specific performance—had such title been produced at the proper date (*h*).

Furthermore, if a vendor contracts to sell in one capacity, *e.g.*, as trustee under a power of sale, he cannot compel a purchaser to enter into a fresh contract of sale whereby the property would be conveyed from a party holding the title in another capacity, *e.g.*, the tenant for life (*i*).

Contract for sale in one capacity cannot be fulfilled by sale in another.

If the parties to the contract of sale agree upon a sum payable as liquidated damages in case of default on the part of the vendor, of course no additional claim for damages in excess thereof can be maintained (*k*)—not even a claim for interest upon money kept “suspended” prior to the date of breach.

Liquidated damages.

Action by Vendor against Vendee for Failure to Complete.

In cases where an agreement for the sale of real or leasehold property has been entered into, and the purchaser refuses to complete the contract, the vendor can recover damages upon the same basis as if he had agreed to sell goods and the purchaser had refused to accept them (*l*).

Damages for failure to complete.

In other words, in such cases a cause of action certainly arises for nominal damages (*m*), and, if properly incurred, for consequential damages (*n*). (As to what damages would be deemed too remote, *vide supra*, pp. 10 *seqq.*)

Nominal damages, at least, recoverable.

The measure of damages in a case of breach by the intended lessee of an agreement to take a lease would stand upon the same footing (*o*). In fact, for many purposes, an executory agreement for a lease is equivalent to a lease (*p*).

Damages on same footing for agreement to take either a conveyance or a demise.

It is to be observed that in cases where the contracting parties agree that the purchaser’s deposit shall be forfeited upon failure to complete, the purchaser cannot contend that such forfeiture is in the nature of a penalty (*q*).

Forfeiture of deposit not a penalty.

(*h*) *Wilde v. Fort*, (1812) 4 Taunt. 334; cf. *Seaward v. Willock*, (1804) 5 East, 198, at p. 208.

(*i*) *In re Bryant and Barningham’s Contract*, (1890) 44 Ch. D. 218.

(*k*) *Sweetland v. Smith*, (1833) 3 Tyrwh. Rep. 491.

(*l*) *Laird v. Pim*, (1841) 7 M. & W. 474; cf. *Noble v. Edwardes*, (1877) 5 Ch. D. 378, C. A.

(*m*) *Cf. Fotherby v. Metropolitan Ry. Co.*, (1866) L. R. 2 C. P. 188, *per* Erle, C.J., at p. 194.

(*n*) *Cf. Morgan v. Metropolitan Ry. Co.*, (1868) L. R. 3 C. P. 553, *per* Bovill, C.J., at p. 560.

(*o*) *Ex parte Llynvi Coal and Iron Co., In re Hide*, (1871) L. R. 7 Ch. 28; cf. *Foster v. Wheeler*, (1888) 38 Ch. D. 130, *per* Bowen, L.J., at p. 134.

(*p*) *Cf. Walsh v. Lonsdale*, (1882) 21 Ch. D. 9.

(*q*) *Hinton v. Sparkes*, (1868) L. R. 3 C. P. 161.

Set-off of deposit in case of re-sale.

On the other hand, the vendor cannot recover damages arising from a less remunerative resale from the defaulting purchaser beyond the amount of the deposit, without allowing the latter to set off the amount of the deposit which has been forfeited (r).

But, if there has been no resale, the vendor can both retain the deposit and recover the expenses he has incurred in preparing for the abortive sale (s).

SECTION III.

Covenants applicable to a Conveyance or a Demise.

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General Measure of Damages for Breach of Covenant.

Covenants express or implied.

Covenants may be express or implied (t). Certain covenants are implied by statute, e.g., upon the insertion in a conveyance or lease of the words “beneficial owner” (u). An express covenant excludes and is destructive of any implied covenant (x).

Damages for breach nominal apart from special damage.

A covenant is, of course, a contract under seal, so that the measure of damages for breach is, like that for breach of contract (y), only nominal, apart from special damage (z).

The case of *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772, vide *infra*, p. 53, is only an apparent and not a real exception to this rule.

In accordance with the rule as stated above, the measure of damages for breach of a covenant to renew a lease is affected by the quality of the covenantor’s title (a).

It is to be observed that in estimating the plaintiff’s loss and the damages recoverable in consequence of the defendant’s breach of a covenant to deliver up demised premises in repair,

(r) *Ockenden v. Henly*, (1858) E. & B. E. 485; cf., however, *Essex v. Daniell*, (1875) L. R. 10 C. P. 538, at p. 554.
(s) *Essex v. Daniell*, *ubi supra*, per Brett, J., at p. 554.
(t) Cf. *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, per Lord Esher, at p. 616; also *Ward (Lord) v. Lumley*, (1860) 5 H. & N. 87, 656, per Martin, B. *Vide infra*, p. 54.
(u) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7.
(x) Cf. *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836, per Lindley, L.J., at p. 840; *Mills v. United Counties Bank, Ltd.*, [1912] 1 Ch. 231.
(y) *Vide supra*, p. 10.
(z) *Wigzell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357; cf. *West v. Houghton*, (1879) 4 C. P. D. 197; *Sayers v. Collyer*, (1883) 24 Ch. D 180; *Columbus Co. v. Clowes*, [1903] 1 K. B. 244.
(a) *Gas Light and Coke Co. v. Towse*, (1887) 35 Ch. D. 519.

the fact that, by reason of a fresh and equally remunerative lease having been entered into, the plaintiff is, in a sense, at the time of action brought, no worse off, is immaterial (*b*), as is also the fact that there has been a collateral increase in the value of the property (*c*), and the fact that the plaintiff's interest in the property has ceased (*d*).

On the other hand, in estimating the damages for breach of a covenant to build, upon which breach the plaintiff has re-entered and demised the premises afresh, the amount of rent reserved in the fresh leases granted is a very material factor (*e*).

Where there are alternative covenants, and the plaintiff declares in respect of breaches of both, he can only recover, upon money being paid into Court and accepted in satisfaction of the one breach, nominal damages in respect of the other (*f*).

Alternative covenants.

Where a plaintiff is entitled to sue for liquidated damages for breach of a covenant he cannot obtain both such damages and an injunction (*g*).

Liquidated damages and injunction not both obtainable.

Vindictive damages may be recovered in proper circumstances for breach of a covenant whereby the reversioner's interest is wantonly damaged, *e.g.*, breach of covenant not to commit waste (*h*).

Substantially, in such a case the action would be treated as one of trespass (*h*). In general, vindictive damages cannot be awarded for breach of covenant (*i*).

Vindictive damages not ordinarily recoverable.

The question of remoteness of damage is governed by the same principles as those applying in ordinary contracts (*k*).

Remoteness of damage.

In a case where the lessee had covenanted not to assign or sub-let premises without the lessor's consent, and, in defiance of the covenant, he sub-let them, without permission, to a turpentine distiller, it was held that, in the particular circumstances, the lessor could recover, as damages, upon the building being destroyed by fire, the loss resulting (*l*).

The damages recoverable may be either retrospective or both retrospective and prospective, according as to whether there is or is not a continuing cause of action (*m*).

As a rule, only the parties to a covenant—or their assigns, in

Who may sue.

(*b*) *Joyner v. Weeks*, [1891] 2 Q. B. 31.

(*c*) *Morgan v. Hardy*, (1886) 17 Q. B. D. 770, reversed on another point, (1888) 13 App. Cas. 351.

(*d*) *Clow v. Brogden*, (1840) 2 M. & Gr. 39, per Tindal, C.J., at p. 54.

(*e*) *Oldershaw v. Holt*, (1840) 12 A. & E. 590; *Marshall v. Mackintosh*, (1898) 78 L. T. 750, per Kennedy, J., at p. 752; cf. *Wigsell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357.

(*f*) *Foley v. Addenbrooke*, (1844) 13 M. & W. 174.

(*g*) *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377.

(*h*) *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, per Bowen, L.J., at p. 618.

(*i*) *Vide supra*, p. 6.

(*k*) *Vide supra*, pp. 10 et seq.

(*l*) *Lepla v. Rogers*, [1892] 1 Q. B. 31, per Hawkins, J., at p. 37; cf. *Atkins v. Hutton*, (1910) 103 L. T. 514.

(*m*) *Vide supra*, pp. 20, 21, 40, 41.

some cases—can sue or be sued upon a covenant (*n*). Where, however, a certain property is split up and conveyed in portions, subject, *e.g.*, to a common building scheme, and appropriate restrictive covenants are inserted in the conveyances, such covenants may be sued upon both by the original covenantees and by other parties interested in the common scheme (*o*).

Action by Vendee or Lessee on Covenant.

Covenant for Quiet Enjoyment (p).

When cause
of action
accrues.

Measure of
damages.

The purchaser cannot sue for breach of covenant for quiet enjoyment until he has, in fact, been ejected or molested.

An ejected purchaser of a leasehold interest can recover damages, the measure of which consists of

- (1) the value of the unexpired term (*q*) ;
- (2) the damages, if any, recovered by the ejector against the plaintiff as mesne profits, without interest (*r*) ;
- (3) expenses and loss incurred as a natural consequence of the breach of covenant (*s*).

Such expenses may include damages other than mesne profits, and costs properly incurred and paid, in proceedings brought by the ejector against the plaintiff (*t*).

In one case it was held that the plaintiff could recover the difference in value between the term of his void lease and the term granted to the plaintiff by a fresh lease executed by the reversioner, and also the additional costs, if any, of the reversioner's lease over that of the pseudo-lessor—the defendant (*u*).

It is to be observed that the cases upon which the above principles depend were mostly decided before the case of *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158, and that the modern tendency seems to be rather to extend the principle of that case even to breaches of covenant (*x*).

On the other hand, the above principles, as to the recovery of consequential damages for breach of covenant, arising from

(*n*) *Storer v. Gordon*, (1814) 3 M. & S. 308 ; cf. *Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629.

(*o*) *Spicer v. Martin*, (1888) 14 App. Cas. 12 ; *In re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342 ; cf. *Rogers v. Hosegood*, [1900] 2 Ch. 388.

(*p*) Cf. Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 ; Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 122.

(*q*) *Williams v. Burrell*, (1845) 1 C. B. 402.

(*r*) *Ibid.*

(*s*) *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836, though this case is not strictly one of breach of covenant ; see p. 840 ; and cf. *Jones v. Hawkins*, (1886) 3 T. L. R. 59.

(*t*) *Smith v. Crompton*, (1832) 3 B. & Ad. 407 ; *Rolph v. Crouch*, (1867) L. R. 3 Ex. 44 ; cf. *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316, *per* Buckley, J., at p. 323.

(*u*) *Lock v. Furze*, (1865) 19 C. B. N. S. 96 ; affirmed (1866) L. R. 1 C. P. 441.

(*x*) *Gas Light and Coke Co. v. Touse*, (1887) 35 Ch. D. 519 ; cf. *Strong v. Kean*, (1849) 13 Ir. L. R. 93, at p. 128.

infirmity of the vendor's title, have been expressly approved in another series of modern cases (*y*).

It would appear that a mere temporary inconvenience which does not interfere with the lessee's estate, title, or possession does not constitute a breach of covenant for quiet enjoyment (*z*). Hence, no damages could be recovered in an action upon the covenant in respect of such inconvenience, though, of course, an action might well lie in trespass.

What constitutes a breach of covenant for quiet enjoyment.

Similarly, a mere interference with comfort and privacy (*a*), or an annoyance, *e.g.*, from dancing, which may even in itself sustain an action for damages in nuisance (*b*), does not constitute a breach of covenant for quiet enjoyment.

On the other hand, a verdict for 100*l.* damages was sustained by the Court of Appeal, in a case where the breach of covenant consisted in the wrongful giving of notice by the lessor to sub-tenants of the lessee to the effect that the sub-tenants should pay rent directly to the lessor, in consequence of which notice one sub-tenant did pay rent directly to the lessor (*c*).

Furthermore, a lessor might, presumably, be liable, under the covenant, for a flooding of his lessee's premises with water, if such event occurred directly through the lessor's negligence (*d*).

A covenant for quiet enjoyment being one of a continuing character, it follows that repeated breaches of the covenant give rise to repeated causes of action (*e*); hence, the recoverable damages are retrospective only and not prospective (*f*).

Continuing covenant.

A person having only an *interesse termini* cannot maintain an action upon a covenant for quiet enjoyment (*g*). Further, a lessor cannot be made liable under this form of covenant for unauthorised acts committed by persons to whom he has assigned the reversion, which acts the lessor himself could not lawfully have committed (*h*).

Who may sue.

Covenant for Title (i).

A purchaser may sue for breach of covenant for title before he has, in fact, been ejected or molested (*k*).

When cause of action accrues.

(*y*) *Jenkins v. Jones*, (1882) 9 Q. B. D. 128; *Turner v. Moon*, [1901] 2 Ch. 825; *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316; *cf.*, however, *Henty v. Wrey*, (1882) 19 Ch. D. 492.

(*z*) *Manchester, Sheffield and Lincolnshire Ry. Co. v. Anderson*, [1898] 2 Ch. 394, *per* Lindley, M.R., at p. 401.

(*a*) *Browne v. Flower*, [1911] 1 Ch. 219.

(*b*) *Jenkins v. Jackson*, (1888) 40 Ch. D. 71.

(*c*) *Edge v. Boileau*, (1885) 16 Q. B. D. 117.

(*d*) *Cf. Anderson v. Oppenheimer*, (1880) 5 Q. B. D. 602, *per* Cotton, L.J., at p. 608.

(*e*) *Vide supra*, p. 40.

(*f*) *Child v. Stenning*, (1879) 11 Ch. D. 82.

(*g*) *Wallis v. Hands*, [1893] 2 Ch. 75, at p. 86.

(*h*) *Williams v. Gabriel*, [1905] 1 K. B. 155.

(*i*) *Cf. Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), s. 7; *Lands Clauses Act*, 1845 (8 & 9 Vict. c. 18), s. 122.

(*k*) *Kingdon v. Nottle*, (1815) 4 M. & S. 53.

Measure of damages.

A purchaser under a conveyance, which is not entirely nugatory, may recover damages, the measure of which is the difference between the value of the interest purported to be conveyed and the value of the interest in fact conveyed (*l*).

Furthermore, consequential damages may be recovered (*m*).

Not a continuing covenant.

This mode of assessment is founded upon the now accepted hypothesis that a breach of covenant for title is of a single and not of a continuing character (*n*), and that the damages awarded should therefore be both retrospective and prospective in character.

A dispossessed vendee of land purported to be held in fee simple can recover damages, the measure of which is the full value of the land (*o*). Uncertainty exists, however, as to the manner in which the value must be ascertained.

Assessment of value of land.

According to the better opinion, the recoverable value is the value at the date of conveyance, together with the capital outlay, if any, expended by the plaintiff in improving the property (*p*).

Collateral or "unearned" increment accruing between the date of conveyance and of dispossession would probably be irrecoverable (*q*).

Similar principles apply—*exceptis excipiendis*—whether the property be leasehold or freehold, and whether the dispossession be partial (*r*) or total.

Covenant in a lease.

Hence, in the case of a leaseholder who is evicted by title paramount, the measure of damages recoverable would be governed according to the rule stated in *Williams v. Burrell*—*vide supra*, p. 50—the rent having been first duly apportioned (*s*).

Suspension of rent.

This qualification, however, must be made, namely, that where a lessor himself, or any one privy in title to him, ejects the lessee, the entire rent during the continuance of the eviction is suspended (*t*).

(*l*) *Turner v. Moon*, [1901] 2 Ch. 825; cf. *Jenkins v. Jones*, (1882) 9 Q. B. D. 128.

(*m*) *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316.

(*n*) *Turner v. Moon*, [1901] 2 Ch. 825, *per* Joyce, J., at p. 828; cf. *Spoor v. Green*, (1874) L. R. 9 Ex. 99, *per* Bramwell, B., at pp. 110 and 111; *per contra*, *Kingdon v. Nottle*, *ubi supra*, *per* Lord Ellenborough, at p. 57; *Spoor v. Green*, *ubi supra*, at p. 117; cf. also *King v. Jones*, (1814) 5 Taunt. 418; (1815) 4 M. & S. 188.

(*o*) *Jenkins v. Jones*, *ubi supra*; cf. *Spencer v. Registrar of Titles*, (1910) 103 L. T. 647.

(*p*) *Bunny v. Hopkinson*, (1859) 27 Beav. 565; cf. *Rolph v. Crouch*, (1867) L. R. 3 Ex. 44; *Spencer v. Registrar of Titles*, [1908] A. C. 235; cf., however, *Lewis v. Campbell*, (1819) 8 Taunt. 715, *per* Dallas, C.J., at p. 727.

(*q*) *Wace v. Bickerton*, (1850) 3 De G. & S. 751, at p. 756; *Staats v. Ten Eyck's Exors.*, (1805) 3 Caines, 111 f., *per* Kent, C.J.; cf., however, *Lock v. Furze*, (1865) 19 C. B. N. S. 96, at p. 102, where it appears that the plaintiff substantially recovered—in a case about a leasehold interest—damages in respect of the enhanced value of the land.

(*r*) Cf. *Morris v. Phelps*, (1809) 5 Johnson's Rep. 49, *per* Kent, C.J., at p. 55.

(*s*) *Stevenson v. Lambard*, (1802) 2 East, 575; *Boodle v. Campbell*, (1844) 7 M. & Gr. 386.

(*t*) *Morrison v. Chadwick*, (1849), 7 C. B. 266; cf., however, *Walker's Case*, 1587) 3 Co. Rep. 22, at p. 22. *Vide infra*, pp. 72, 73.

A purchaser under a conveyance which is wholly nugatory, who has never taken possession, can only recover such damages as consist of the purchase-money with interest (*u*). Nugatory conveyance.

Such an action would, substantially, be one for money had and received upon a failure of consideration (*x*).

Covenant for Further Assurance (y).

It would appear that where a covenant for further assurance has been broken the measure of damages is the loss actually sustained up to the time of action brought (*z*). Measure of damages.

The question as to whether in this case the damages are retrospective, or both retrospective and prospective, is, however, it is submitted, really similar in most respects to the same question with regard to a breach of covenant for title; as to which *vide supra*, p. 52.

The action must be maintained by the heir,—if need be—not by the executor (*z*). *Vide infra*, p. 283.

Covenant against Incumbrances (y).

The measure of damages for breach of covenant against incumbrances is the same whether the plaintiff has or has not sustained actual damage, namely, the full amount of the incumbrances (*a*). Measure of damages.

The same liability attaches whether the terms of the covenant constitute an undertaking “against incumbrances,” or one to pay off existing incumbrances (*a*).

In the case, however, of a covenant against a contingent incumbrance, only nominal damages are recoverable apart from special damage (*b*).

(*u*) *Bickford v. Page*, (1807) 2 Mass. 455, at p. 461; cf., however, *Johnson v. Johnson*, (1802) 3 B. & P. 162, *per* Lord Alvanley, at p. 170.

(*x*) Cf. *Baber v. Harris*, (1839) 9 A. & E. 532; cf., however, *Johnson v. Johnson*, *ubi supra*, at p. 170.

(*y*) Cf. Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7.

(*z*) *King v. Jones*, (1814) 5 Taunt. 418, *per* Heath, J., at p. 428; affirmed, *Jones v. King*, (1815) 4 M. & S. 188.

(*a*) *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772; cf., however, *Herrick v. Moore*, 19 Maine, 313.

(*b*) *Vane v. Barnard (Lord)*, (1709) Gilb. Eq. Rep. 6, *per* Lord Chancellor, at p. 7.

SECTION IV.

Leasehold Covenants.

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Certain covenants, such as those for quiet enjoyment and title which have already been dealt with, are usually implied (e), or expressly inserted in a conveyance of real or leasehold property. Certain other covenants, in addition to the covenant for quiet enjoyment (see p. 46, note (f)), on the part of the lessor or the lessee are usually implied or inserted in leases and regulate the conditions of tenure. The more common of these latter covenants will be dealt with in this section. The covenant to pay rent is dealt with in Section V.

It would be beyond the scope of this book to deal with the manner in which covenants may come to be implied, or to discuss the question as to what covenants run, and what covenants do not run, with the land.

Upon the latter point the leading case is *Spencer's Case* (d). As mentioned above (e), under certain special circumstances, restrictive covenants may be sued upon by persons other than either those who entered into them or their assigns.

Covenant as to Fitness for Habitation.

When implied.

A covenant of fitness for habitation is implied upon the letting of a furnished house (f). The warranty of fitness only applies to the condition of the premises at the commencement of the lease (g).

In cases where platforms or buildings or other accommodation is provided for spectators, for reward, there is an implied warranty, on the part of the person receiving the money, that due care has been employed in providing such accommodation (h).

(c) Cf. Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7.
(d) (1582) Smith's L. C. (10th ed.), at p. 52.
(e) *Vide supra*, p. 50.
(f) *Wilson v. Finch Hatton*, (1877) 2 Ex. D. 336 ; affirming *Smith v. Marrable*, (1843) 11 M. & W. 5.
(g) *Sarson v. Roberts*, [1895] 2 Q. B. 395.
(h) *Francis v. Cockrell*, (1870) L. R. 5 Q. B. 501.

The measure of damages recoverable is the consequential loss attendant upon the breach, and it may be said that its scope is not very rigidly confined (*i*). Measure of damages.

In general, no covenant of fitness for habitation is implied upon the letting of an unfurnished house (*k*). It is provided, however, by the Housing of the Working Classes Act, 1890 (*l*), s. 75, that "in any contract for letting for habitation by persons of the working classes a house or a part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation" (*m*). This provision has been extended by the Housing and Town Planning Act, 1909 (*n*), s. 14, and it is further provided by section 15 of the latter Act that the condition shall imply an undertaking of continuance of fitness for habitation. Workmen's dwellings.

Covenant to Insure.

In cases where a lessee covenants, as, in practice, he usually does, to insure the property leased to him, the lessor upon breach of the covenant can recover damages.

The measure of damages is not precisely defined by existing English authority. Measure of damages vague.

Where actual damage has resulted and the ultimate loss has finally accrued, it would seem that the amount recoverable is probably the exact value of the property destroyed (*o*). The damages certainly cannot exceed the amount of the loss (*p*).

Where, upon breach of the covenant by the lessee, the lessor has himself taken out an insurance policy, the latter can recover as special damage the premiums paid by him, provided the insurance be effected in strict accordance with the terms of the covenant (*q*).

If the lessor do not observe the terms of the covenant in effecting the insurance he can only claim general damages, if no actual loss has resulted to the property (*q*).

Where, upon breach of the covenant by the lessee, the lessor has not himself effected an insurance and he brings an action to recover damages before any actual loss has accrued to him, it would seem that the measure of damages is the minimum

(*i*) Cf. *Wilson v. Finch Hatton*, (1877) 2 Ex. D. 336, *per Kelly*, C.B., at p. 342.

(*k*) *Lane v. Cox*, [1897] 1 Q. B. 415.

(*l*) 53 & 54 Vict. c. 70.

(*m*) Cf. *Walker v. Hobbs*, (1889) 23 Q. B. D.

(*n*) 9 Edw. 7, c. 44.

(*o*) *Bettleley v. Stainsby*, (1862) 12 C. B. N. S. 477, *per Erle*, C.J., at p. 499; *per contra*, *Charles v. Altin*, (1854) 15 C. B. 46, *per Maule*, J., at pp. 66 and 67; cf. *Williams v. Lassell*, (1906) 22 T. L. R. 443.

(*p*) *Vide Charles v. Altin*, *ubi supra*, *per Maule*, J., at pp. 66 and 67.

(*q*) Cf. *Hey v. Wyche*, (1842) 12 L. J. Q. B. 83.

amount necessary to provide for an insurance in the terms of the covenant.

Certainly, in this case, the full value of the property insured is not necessarily the measure of damages (*r*), but only such compensation as the jury think is required to repair the injury done by the breach of the covenant (*s*).

Past risk ought probably to be disregarded except as entitling the plaintiff to nominal damages (*t*).

Covenant to Pay Rates and Taxes.

Incidence of rates and taxes as between landlord and tenant.

The ordinary rule is that most of the rates and taxes fall upon the tenant in the absence of express agreement (*u*). But they may, by agreement, be thrown partly or wholly upon the landlord or the tenant, except in the case of the property tax and tithe rent-charge and certain licence duties which are incapable of being transferred to the tenant (*x*). Such agreement is, of course, to be construed according to the real intention of the parties (*y*).

Usually the tenant expressly covenants to pay rates and taxes (*u*).

Limitation of distinction between "landlord's taxes" and "tenant's taxes."

In practice, a distinction is drawn between so-called "landlord's taxes," *e.g.*, land tax, and "tenant's taxes," *e.g.*, poor rate. But, it is to be observed that a "landlord's tax" is only to be so regarded as between landlord and tenant, and not with respect to the public (*z*), since the landlord is not personally liable therefor (*a*).

When breach occurs.

A covenant to pay rates and taxes is broken as soon as the rates and taxes are due, if left unpaid, even though they may not have been demanded (*b*).

Measure of Damages.

The measure of damages for breach of such a covenant would, presumably, vary in certain cases according as to whether the defendant is or is not primarily liable for the unpaid taxes.

"Tenant's taxes"—action by landlord.

Thus, in the case of so-called "tenant's taxes" the landlord is not liable at all, except by means of legal process against his premises. Accordingly, a covenant on the part of the tenant to

(*r*) Cf. *Cahill v. Dawson*, (1857) 3 C. B. N. S. 106.

(*s*) *Charles v. Altin*, *ubi supra*, per Maule, J., at p. 66; cf. *National Assurance Association v. Best*, (1857) 2 H. & N. 605, per Pollock, C.B., at p. 615.

(*t*) Cf., however, *Hey v. Wyche*, *ubi supra*.

(*u*) *Vide* Foa on Landlord and Tenant (4th ed.) at pp. 182, 183.

(*x*) Cf. 5 & 6 Vict. c. 35, s. 103; *Ludlow v. Pike*, [1904] 1 K. B. 531; 10 Edw. 7, c. 8, s. 46.

(*y*) Cf. *Watkins v. Atkins*, (1820) 3 B. & Ald. 647.

(*z*) *R. v. Mitcham*, (1779) 1 Doug. 225, per Buller, J., at p. 227.

(*a*) *Cumming v. Bedborough* (1846) 15 M. & W. 438, per Pollock, C.B., at p. 440.

(*b*) *Davis v. Burrell*, (1851) 10 C. B. 821.

pay "tenant's taxes" is equivalent, so far as damages are concerned, to a covenant to repair. The landlord, upon breach thereof by the tenant, could recover damages in respect of injury inflicted upon his reversion, by a distress being put in, or other loss accruing in consequence of arrears being due (*c*). But it is to be noted that in the case of a gas rate an incoming tenant is not liable for the arrears of his predecessor (*d*), so that if a tenant left the premises without payment of such rate, the reversion would be in no way prejudiced in consequence of arrears being due.

If the landlord has covenanted to pay so-called "tenant's taxes" and fails to do so, the measure of damages would be, at least, the whole amount of the tax. But, special damages, if incurred, could be recovered. Such a covenant may in proper cases be deemed to constitute one of indemnity, so that if the tenant were imprisoned for non-payment he could recover damages in respect of such imprisonment (*e*).

Action by tenant.

Furthermore, since such a covenant is tantamount to a covenant by the landlord against incumbrances, the tenant could recover the amount of such tax whether he—the tenant—had paid it or not (*f*).

With regard to so-called "landlord's taxes," since the landlord is *prima facie* though not personally liable therefor (*g*), the landlord, upon breach of a covenant by the tenant to pay them, could probably only recover the amount of the taxes as damages. Furthermore, the landlord cannot, in such a case, even recover the unpaid tax, if he claims it in an action for money paid to his tenant's use or on his tenant's behalf (*h*).

"Landlord's taxes"—action by landlord.

If the landlord has covenanted to pay "landlord's taxes," such a covenant is analogous to one for quiet enjoyment. The tenant, upon a breach thereof by the landlord, can recover special damages—if any—incurred, *e.g.*, by a distress being put in or by his being imprisoned (*e*).

Action by tenant.

But, if the tenant, to prevent a distress, himself pays the taxes, he may deduct such payment from his next rent due, as a payment thereof *pro tanto* (*i*).

In fact, if the tenant does pay "landlord's taxes," he cannot recover the amount in an action for money paid on his landlord's

(*c*) Cf. *Woods v. Pope*, (1835) 6 C. & P. 782.

(*d*) *Cannon Brewery Co., Ltd. v. Gas Light and Coke Co.*, [1904] A. C. 331.

(*e*) *Atkins v. Hutton*, (1910) 103 L. T. 514; cf. *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

(*f*) *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772.

(*g*) Cf. *Cumming v. Bedborough*, (1846) 15 M. & W. 438, *per* Pollock, C.B., at p. 440.

(*h*) *Spencer v. Parry*, (1835) 3 Ad. & E. 331.

(*i*) 5 & 6 Vict. c. 35, s. 60 (property tax); 38 Geo. 3, c. 5, s. 18 (land tax); *Roper v. Bumford*, (1810) 3 Taunt. 76; *Tinckler v. Prentice*, (1812) 4 Taunt. 549.

behalf (*j*), but must recoup himself by such deduction from ensuing rent (*j*), in the absence of special circumstances (*k*).

The tenant may adopt this method of recouping himself, *i.e.*, deduction from ensuing rent, not only in the cases mentioned in the footnote (*l*), but also in respect of any payment necessarily made by him in liquidation of a charge upon the land (*m*).

But, the amount so deducted must, of course, be genuinely payable by and on behalf of the landlord (*n*).

Covenant not to Assign.

A covenant not to assign "runs with the land." Hence, an assignee of a lease is bound by it (*o*). An injunction will lie upon a threat to commit a breach of such a covenant (*p*). But, it is to be noted that section 3 of the Conveyancing and Law of Property Act, 1892 (*q*), which applies to all leases, whether executed before or since 1892, engrafts upon every covenant against assignment or underletting without consent, contained in any lease in which there is no express stipulation to the contrary, a proviso that no money shall be payable in respect of such consent (*r*). If the lessor insists upon payment before giving consent, the lessee is relieved from obtaining such consent and can make a valid assignment without it (*r*).

Measure of Damages.

The measure of damages in an action for breach of a covenant not to assign is such a sum as will place the landlord in the same position as if the covenant had not been broken (*s*).

In other words, in those cases in which the defendant, by his assignment, has freed himself from future liability upon the lease to his landlord, the plaintiff, the latter is entitled to such a sum as will put him in the same position as if he still had the defendant's liability, instead of that of a person of inferior pecuniary liability, to look to for breaches of covenant both past and future (*t*).

A lessee does not—speaking generally—by an assignment free

(*j*) *Cumming v. Bedborough* (1846), 15 M. & W. 438; *Lamb v. Brewster*, (1879) 4 Q. B. D. 607, *per* Brett, L.J., at p. 609; *Stubbs v. Parsons*, (1820) 3 B. & Ald. 516; *cf.* *Earle v. Maugham*, (1863) 14 C. B. N. S. 626, *per* Williams, J., at p. 629.

(*k*) *Cf.* *Lamb v. Brewster*, *ubi supra*; 10 Edw. 7, c. 8, s. 46.

(*l*) See note (*i*), p. 57.

(*m*) *Cf.* 16 & 17 Vict. c. 34, s. 35; *Jones v. Morris*, (1849) 3 Exch. 742; *Taylor v. Zamira*, (1816) 6 Taunt. 524; 1 Smith, L. C. (11th ed.), at pp. 162 *et seq.*

(*n*) *Cf.* *Mansfield v. Relf*, [1908] 1 K. B. 71; *Salaman v. Holford*, [1909] 2 Ch. 602.

(*o*) *Williams v. Earle*, (1868) L. R. 3 Q. B. 739.

(*p*) *McEacharn v. Colton*, [1902] A. C. 104.

(*q*) 55 & 56 Vict. c. 13, s. 3.

(*r*) *West v. Gwynne*, [1911] 2 Ch. D. 1.

(*s*) *Williams v. Earle*, *ubi supra*, *per* Blackburn, J., at p. 751.

(*t*) *Langton v. Henson*, (1905) 92 L. T. 805, *per* Buckley, J., at p. 807.

himself from future liability to the lessor upon the lease; but a mere assignee does, by means of a fresh assignment, free himself from all future liability to the lessor upon the lease.

If the defendant by his assignment has not freed himself from future liability upon the lease (*u*), or if he has assigned to a person as solvent as himself, presumably the damages would be merely nominal (*x*); though some damages might perhaps be recoverable for an interference with the right of distress.

But, if the landlord has no remedy against the defendant's assignee for a particular loss incurred through such assignee's occupancy, *e.g.*, destruction of the premises by fire, the landlord may recover, in proper circumstances, such loss from the defendant (*y*). In such a case, the loss must be capable of being regarded as a probable result of the defendant's breach of covenant not to assign (*z*).

Covenant to deliver up Possession.

A covenant on the part of a tenant to deliver up to his landlord, at the expiration of the lease, the premises leased to him, will be implied, if not expressed, in the case of all ordinary leases (*a*).

Measure of Damages.

The measure of damages, in an action for breach of a covenant to deliver up possession, is the actual damage sustained by the landlord—not necessarily the full value of the premises or fixtures (*b*).

In computing the landlord's loss, regard may be paid to damages and costs for which he may have been rendered liable to a third party to whom he had agreed, but has been unable, to relet the premises (*c*).

The landlord can recover the value of the premises for the period during which he is kept out of possession and the costs—if any—incurrd in ejecting the lessee or any one privy in title to the lessee (*d*).

(*u*) As to the respective liabilities of a lessee and an assignee to a lessor, *vide* Foia on Landlord and Tenant (4th ed.), at p. 162; Woodfall on Landlord and Tenant (18th ed.), at p. 188.

(*x*) *Vide supra*, p. 48.

(*y*) *Lepla v. Rogers*, [1892] 1 Q. B. 31.

(*z*) *Lepla v. Rogers*, *ubi supra*, *per* Hawkins, J., at p. 37.

(*a*) *Henderson v. Squire*, (1868) L. R. 4 Q. B. 170, *per* Blackburn, J., at pp. 173, 174.

(*b*) *Watson v. Lane*, (1856) 11 Ex. 769, *per* Martin, B., at p. 774.

(*c*) Cf. *Bramley v. Chesterton*, (1857) 2 C. B. N. S. 592, *per* Willes and Williams, JJ., at p. 606.

(*d*) *Henderson v. Squire*, *ubi supra*.

Covenants relating to Renewal of Lease.

A lease may contain a covenant whereby the lessor undertakes to renew the lease at its expiration, upon the same terms as formerly subsisted, upon the request of the lessee.

Such a covenant does not of itself necessarily imply an agreement for perpetual renewal (*e*); but, the lease may explicitly provide for a perpetual renewal (*f*), without contravening the rule against perpetuities (*g*).

The lease may, and frequently does, further provide for the payment by the lessee of a fine or premium upon renewal. The lessor's covenant to renew may be enforced by specific performance (*h*).

A covenant to renew, "at the request, costs, and charges of the lessee," renders the latter liable for costs reasonably and necessarily incurred by the lessor's solicitor in the investigation of the lessee's title to renewal (*i*).

Also, a covenant for renewal "at the costs of the lessee" upon payment by him of a fine calculated upon a standard to be ascertained—if he choose—by arbitration renders the lessee liable, upon an arbitration being held, to the costs of reference and award (*k*), since such costs are incidental to the process of renewal (*k*).

A lessee of property who has covenanted with his sub-lessee to renew the sub-lease without payment of any fine as often as he—the lessee—can obtain renewal from his lessor cannot claim contribution from the sub-lessee or refuse to renew the sub-lease, even although the lessor increases the renewal fine upon the original lease to such a sum as may make the rent payable by the sub-lessee to the lessee wholly unremunerative to the latter (*l*).

The damages recoverable from a lessor upon non-fulfilment of his covenant to renew a lease will largely depend upon the quality of his title (*m*). If his title be bad, less damages can be recovered than if it had been good (*m*). In proper cases special damages might perhaps be recovered (*n*), though the fact that, if the title be good, specific performance may be obtained, would hamper the plaintiff.

(*e*) *Tritton v. Foote*, (1789) 2 Bro. C. C. 636; *Iggulden v. May*, (1804) 7 East 237; cf., however, *Austin v. Newham*, [1906] 2 K. B. 167.

(*f*) Cf. *Nicholson v. Smith*, (1882) 22 Ch. D. 640.

(*g*) *Hare v. Burgess*, (1857) 4 K. & J. 45; cf. *L. & S. W. Ry. Co. v. Gomm*, (1882) 20 Ch. D. 562, *per* Jessel, M.R., at p. 579.

(*h*) *Lewis v. Stephenson*, (1898) 69 L. J. Q. B. 296; *Revell v. Hussey*, (1813) 2 Ball & B. 280.

(*i*) *In re Baylis*, [1907] 2 Ch. 54.

(*k*) *Fitzsimmons v. Mostyn (Lord)*, [1904] A. C. 46.

(*l*) *Revell v. Hussey*, (1813) 2 Ball & B. 280.

(*m*) *Strong v. Kean*, (1849) 13 Ir. L. R. 93, Exch., at p. 128; *Gas Light and Coke Co. v. Towse*, (1887) 35 Ch. D. 519.

(*n*) Cf. *Engel v. Fitch*, (1869) L. R. 4 Q. B. 659.

Similarly, a lessee who sub-lets a portion of his premises to a sub-lessee for a certain term of years, upon condition that the sub-lessee shall pay to the lessee such part of the fine, or fines, which become payable upon every renewal of the lease by which the lessee holds the premises from his lessor, as shall be payable in respect of the premises sub-let, cannot, upon the lessor granting to him—the lessee—a fresh lease extending beyond the date of expiration of the sub-lease, recover from the sub-lessee more than such part of the renewal fine as is commensurate with the sub-lessee's interest (o).

Covenants Relating to the Use of Property on Lease.

The remainder of this section will deal with covenants relating to (1) mining, (2) farming, (3) building, (4) trade, (5) waste, and (6) repair.

Breaches of any such covenants may usually be restrained by injunction, provided the covenants are substantially negative in character (p). But, as a rule, mandatory injunctions (q) or specific performance of the covenant cannot be obtained (r).

Even, however, in those cases where an injunction is obtainable the plaintiff may sue for damages if he prefer (s), or he may be awarded them in lieu of or in addition to an injunction (t). If the breach has been actually committed, of course, the plaintiff's only remedy in respect of past injury is an action for damages.

(1) Mining Covenants.

Mining covenants are usually inserted in leases of mines for the purpose of securing either or both of the following advantages to the landlord: (1) an adequate return upon royalties in addition to the minimum or dead rent charged; (2) efficient working of the mine with consequent protection of the reversionary interest.

A covenant to work a mine so long as it is "fairly workable" does not place the tenant under an obligation to work it after it has become wholly unremunerative (u).

But on the other hand, an unqualified covenant to sink shafts

(o) *Charlton v. Driver*, (1820) 2 Brod. & B. 345.

(p) *Harris v. Boots*, [1904] 2 Ch. 376; cf. *Crosse v. Duckers*, (1873) 27 L. T. 816.

(q) *Bowes v. Law*, (1870) L. R. 9 Eq. 636; *Musgrave v. Horner*, (1874) 31 L. T. 632.

(r) Fry on Specific Performance (5th ed.), at pp. 43 and 47; *Flint v. Brandon*, (1803) 8 Ves. 159; cf., however, *Molyneux v. Richard*, [1906] 1 Ch. 34.

(s) *Lumley v. Metropolitan Ry. Co.*, (1876) 34 L. T. 774.

(t) *Nicoll v. Fenning*, (1881) 19 Ch. D. 258; cf. *Bowes v. Law*, *ubi supra*; *Cowper v. Laidler*, [1903] 2 Ch. 337, *per* Buckley, J., at p. 339. *Vide infra*, p. 304.

(u) *Jones v. Shears*, (1836) 7 C. & P. 346.

in a mine is an absolute covenant which must be performed even if its performance entail a loss to the lessee (*x*).

Similarly, in a recent case where the lessees had covenanted to "duly and honestly" work the whole of a certain seam of coal, they were mulcted in damages for breach of covenant, although, had they observed the covenant and continued to work it, they would have suffered heavy loss (*y*).

Measure of Damages.

The damages recoverable by the lessor for breach of a mining covenant are, of course, in accordance with the general principle of damages, such a sum as will compensate him for the defendant's breach (*z*).

There is frequently a provision in the lease granting to the lessor a royalty of so much per unit of mineral raised.

If the actual number of tons to be raised annually be specified, no difficulty arises as to the amount of damages. If, on the other hand, the covenant merely provides for "proper working," or is otherwise indefinite, an assessment must take place to ascertain the probable damage (*a*).

In this connection it may be observed that the collateral provisions of the lease may (*b*), or may not (*c*), cause "proper" to be interpreted as "continuous."

In one case, where the defendants agreed—not, however, by covenant in a lease—to sink a shaft and pay a certain sum in the event of coal being found, it was laid down that upon breach of the agreement the plaintiff might recover either the cost of sinking the shaft, or the sum payable upon coal actually being found (*d*).

Covenant not
to mine.

The measure of damages for breach of a covenant not to mine, or not to mine in a particular manner, is usually the damage done to the reversion. But, in cases of wanton breach of such a covenant, exemplary damages might be awarded (*e*).

(2) *Farming Covenants.*

Farming covenants are commonly inserted in agricultural leases, and are framed in accordance with the custom of the country where land is situated—subject, if it be desired, to

(*x*) *Jervis v. Tomkinson*, (1856) 1 H. & N. 195. As to such a covenant being implied, cf. *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742.

(*y*) *Charlesworth v. Watson*, [1906] A. C. 14; cf. *Clifford (Lord) v. Watts*, (1870) L. R. 5 C. P. 577.

(*z*) *Watson v. Charlesworth*, [1905] 1 K. B. 74, per Stirling, L.J., at p. 88.

(*a*) Cf. *Watson v. Charlesworth*, *ubi supra*, per Collins, M.R., at p. 87.

(*b*) Cf. *Sharp v. Wright*, (1859) 28 Beav. 150.

(*c*) *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742, per Lord Hatherley, L.C., at pp. 757, 758.

(*d*) *Pell v. Shearman*, (1855) 10 Ex. 766, at p. 768.

(*e*) Cf. *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, per Bowen, L.J., at p. 618.

particular variations. They are, for the most part, intended to protect the landlord's reversionary interest.

But, it is provided by the Agricultural Holdings Act, 1908, that a tenant shall, in spite of any agreement to the contrary, enjoy complete freedom in his method of cropping of arable land and disposal of his produce throughout his tenancy, except during the last year thereof (*f*). But, the landlord can sue for damages or an injunction if the tenant injures or deteriorates the holding by the exercise of these rights granted to him under the Act (*f*). Apparently, such damages can be recovered in a court of law and not necessarily by arbitration under the Act (*g*).

Measure of Damages.

The damages recoverable for breach of a farming covenant are, in general, the damage done to the reversion.

In cases of wanton breach, exemplary damages might be recovered (*h*).

Where a farm lease contained a covenant not to sell hay or straw off the premises during the last year of tenancy, and provided that in case of breach of the covenant an additional rent of 3*l.* per ton should be paid, it was held that the measure of damages was the manorial value of the hay actually sold (*i*). The reason for this decision was that, since hay and straw differ substantially in value, the clause as to a 3*l.* penalty, in respect of either, was in the nature of a penalty rather than of liquidated damages. But, of course, a clause in the lease stipulating for a fixed additional rental in case of a breach of a farming covenant is not necessarily void as being in the nature of a penalty (*k*).

(3) *Building Covenants.*

Leases frequently contain either a negative covenant to wholly prohibit or to restrict the manner of building, or, on the other hand, a positive covenant to provide for the erection of buildings.

Such leases may or may not contain a proviso for re-entry by the landlord in case of a breach of covenant. But, re-entry does not exonerate the defendant from liability for damages in respect of breaches committed by him prior to the date of such re-entry (*l*).

Measure of Damages.

The damages recoverable by the lessor for breach of a building covenant are such a sum as will place him in the same position

(*f*) 8 Edw. 7, c. 28, s. 26.

(*g*) Spencer's Agricultural Holdings Act (4th ed.), at p. 62.

(*h*) Cf. *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, *per* Bowen, L.J., at p. 618.

(*i*) *Willson v. Love*, [1896] 1 Q. B. 626, at p. 627.

(*k*) *Jones v. Green*, (1829) 3 Y. & J. 298. *Vide supra*, p. 24.

(*l*) Cf. *Hartshorne v. Watson*, (1838) 4 Bing. N. C. 178.

as if the covenant had been duly performed. In other words, such amount would simply be estimated according to the damage done to the reversion (*m*).

Where the landlord upon breach of the covenant had re-entered and made a fresh and more remunerative lease, it was held that, in estimating the "real damage" done to the landlord's interest, the fact of an increased rent having been actually secured might go in diminution of damages (*n*). On the other hand, if after re-entry the landlord is compelled to accept a less rent from the fresh lessee, such fact may serve to enhance the damages (*o*).

In a case of flagrant breach of a restrictive covenant vindictive damages might perhaps be recovered (*p*).

(4) *Covenants relating to Trade.*

A lease may contain either an affirmative covenant to carry on a particular trade or a negative covenant restricting the carrying on of a trade or trades.

Measure of Damages.

The measure of damages for breach of a covenant relating to trade is the same as for breach of a covenant to keep in repair, namely, the damage done to the reversion (*q*).

If the landlord owned adjacent property, whose value was diminished by the defendant's breach of covenant, he could probably recover damages in respect of such lessened value. But, of course, other owners could not sue upon the covenant (*r*), though they might in proper cases maintain an action for nuisance. If, however, the entire property were subject to a common building scheme and the conveyances contained appropriate covenants, other owners might sue upon the covenants (*s*).

If the landlord owned no adjacent property, it is difficult to see how he could obtain more than nominal damages for the breach of covenant by the defendant except in respect of any damage done to his—the landlord's—own reversion, no matter how great the damage might be to the neighbourhood in general (*t*).

In a case of flagrant breach of a trade covenant vindictive damages might perhaps be awarded (*u*), though the court would

(*m*) Cf. *Wigsell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357.

(*n*) *Oldershaw v. Holt*, (1840) 12 A. & E. 590.

(*o*) *Marshall v. Mackintosh*, (1898) 78 L. T. 750, *per* Kennedy, J., at p. 752.

(*p*) *Whitham v. Kershaw*, (1886) 16 Q. B. D. 613, *per* Bowen, L.J., at p. 618.

(*q*) *Vide infra*, pp. 66, 67.

(*r*) *Storer v. Gordon*, (1814) 3 M. & S. 308; cf. *Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629.

(*s*) Cf. *In re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Spicer v. Martin*, (1888) 14 App. Cas. 12.

(*t*) *Vide supra*, p. 48; cf., however, *Spicer v. Martin*, *ubi supra*.

(*u*) *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, *per* Bowen, L.J., at p. 618.

probably consider that the plaintiff ought to have attempted to restrain by injunction any serious breach such as would be calculated to cause grave injury to the reversion.

(5) *Covenants against Waste.*

Waste is of two kinds—voluntary and permissive. Voluntary waste is also subdivided into two classes—meliorating and equitable.

An injunction is not obtainable for the purpose of restraining permissive waste (*x*), but in proper cases voluntary waste may be restrained by that procedure (*y*). A covenant against waste is implied in a tenant's lease (*z*), but there may, of course, be an express covenant to that effect.

Measure of Damages.

The damages recoverable for breach of a covenant against waste are the same as in an action brought by a landlord for non-repair during the currency of the tenancy, namely, the diminution in value of the reversion—less, however, a discount for immediate payment (*a*).

In a case of gross breach vindictive damages might be awarded (*b*).

(6) *Covenants to Repair.*

The burden of covenants to repair demised premises may be either upon the landlord or the tenant. A tenant may undertake to deliver the premises up in repair at the termination of the tenancy or to keep them in repair throughout his occupation of them.

Action by Landlord upon Delivery up of Possession by Tenant.

Where the tenant has covenanted to deliver up the demised premises in a certain state of repair or has agreed to keep them in repair, and the landlord sues at the end of the term, the measure of damages upon breach of the covenant is the amount required in order to put the premises into that final state of repair which is obligatory upon the tenant (*c*), less, however, the amount—if any—which the landlord may have recovered for non-repair during the currency of the term and not expended upon

Measure of damages.

(*x*) *Powys v. Blagrove*, (1854) 4 D. M. & G. 448, per Lord Cranworth, at p. 458.

(*y*) Cf. *Rose v. Spicer*, [1911] 2 K. B. 234; (1912) 28 T. L. R. 432.

(*z*) *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, per Lord Esher, at p. 616.

(*a*) *Whitham v. Kershaw*, *ubi supra*. Vide *infra*, pp. 66, 67.

(*b*) *Whitham v. Kershaw*, *ubi supra*, per Bowen, L.J., at p. 618.

(*c*) *Joyner v. Weeks*, [1891] 2 Q. B. 31, per Lord Esher, M.R., at p. 43; *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, per Lord Esher, M.R., at p. 616; cf. *Woodhouse v. Walker*, (1880) 5 Q. B. D. 404, per Lush, J., at p. 408; *Morgan v. Hardy*, (1886) 17 Q. B. D. 770.

Entry by
landlord.

the property (*d*). The fact that the landlord's actual loss is minimised owing to his having secured another tenant whose lease dates from the expiration of the defendant's (*e*), or owing to a collateral increase in the value of the property or of the neighbourhood (*f*), is immaterial, as is also the fact that the plaintiff's interest in the premises may have ceased (*g*). Entry by the landlord for non-payment of rent does not deprive him of his remedy in damages (*h*).

Liability not
limited by
insurance.

Where the landlord, as additional security, demands a covenant to insure against fire for a specific sum, the tenant's liability upon the destruction of the premises by fire is not limited to the amount covered by the insurance (*i*).

The landlord, however, cannot recover as damages the expense incurred in employing a surveyor to ascertain the condition of the premises (*k*). To this general rule there are two special statutory exceptions (*l*).

Premises
vacant in
consequence
of disrepair.

Where the tenant who has covenanted to keep the demised premises in repair leaves them in a state of disrepair at the end of the tenancy, as a consequence of which they remain unoccupied, the measure of damages is the amount required in order to execute the necessary repairs, together with adequate compensation for the loss of the use of the premises while they are undergoing repair (*m*). It would appear that the fact of other repairs being necessary besides those for which the tenant is responsible is immaterial (*n*), although doubtless the period for repair must not be estimated beyond such time as was reasonably necessary in order to execute those repairs which were incumbent merely upon the tenant.

Tenant for
life.

As to the right of a tenant for life under the Settled Land Act, 1882 (*n*), to claim for himself damages recovered from a lessee for breach of covenant to repair, see *In re Lacon's Settlement* (*o*).

Action by Landlord during Currency of Tenancy.

Measure of
damages.

In an action brought by a landlord against his tenant during the currency of the tenancy for breach of covenant to keep in

(*d*) *Henderson v. Thorn*, [1893] 2 Q. B. 164; cf. *Ebbetts v. Conquest*, (1900) 82 L. T. 560.

(*e*) *Joyner v. Weeks*, [1891] 2 Q. B. 31; cf. *Rawlings v. Morgan*, (1865) 18 C. B. N. S. 776.

(*f*) *Morgan v. Hardy*, (1886) 17 Q. B. D. 770; reversed on another point, (1888) 13 App. Cas. 351.

(*g*) Cf. *Clow v. Brogden*, (1840) 2 M. & Gr. 39, *per* Tindal, C.J., at p. 54.

(*h*) *Davies v. Underwood*, (1857) 2 H. & N. 570, 574.

(*i*) *Digby v. Atkinson*, (1815) 4 Camp. 276.

(*k*) *Logan v. Cox*, (1876) *per* Field, J.; *vide* Mayne on Damages (8th ed.), p. 325.

(*l*) Cf. Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 2; also 55 & 56 Vict. c. 13, s. 2, sub-s. 1.

(*m*) *Woods v. Pope*, (1835) 6 C. & P. 782. On motion to enter a nonsuit, (1835) 1 Bing. N. C. 467; *Proudfoot v. Hart*, (1890) 25 Q. B. D. 42, at p. 47. Cf. *Birch v. Clifford*, (1891) 8 T. L. R. 103.

(*n*) 45 & 46 Vict. c. 38.

(*o*) [1911] 2 Ch. 17.

repair, the measure of damages would now appear, undoubtedly, to be the amount by which the marketable value of the reversion has been diminished (*p*). Formerly, the damages were deemed to be the amount necessary to put the premises into the required state of repair (*q*).

As has already been seen (*r*), the latter basis of calculation is the one employed where the action is brought after the tenancy has expired. A list of cases in which the two respective measures of damages have been awarded may be found in the judgment of Wright, J., in *Joyner v. Weeks*, [1891] 2 Q. B. 31, at p. 37.

It would appear that a covenant to put in repair can only be once broken, and that damages in respect of a breach must therefore be prospective as well as retrospective (*s*).

On the other hand, a covenant to keep in repair may be repeatedly broken and may afford grounds for a continuing cause of action (*s*). It therefore follows that a previous recovery of damages for breach of covenant to keep in repair is no bar to a subsequent action, although such prior recovery may be pleaded in mitigation of damages (*t*).

A vendee of real estate may set off as damages against a vendor who fails to give up possession on the day fixed for completion of the purchase, and permits the property to deteriorate in the interval, such an amount as will compensate him for the injury he has sustained (*u*). Such damages may comprise not only compensation for actual disrepair, but, also, compensation for indirect loss such as inability to lease the premises (*x*).

If a landlord, during the currency of a tenancy, in order to avoid a forfeiture of his own estate to his superior landlord, enter upon the demised premises, and himself execute necessary repairs, he would seem to stand in some danger of losing his right of action against his tenant (*y*), since he would be unable to show any damage to the reversion. It has been clearly established that, under such circumstances, if there exist a special covenant to repair after notice, and notice has been given, the landlord in an action brought before the expiration of such

Covenant to "put in repair" gives rise only to one cause of action.

Covenant to "keep in repair" may give rise to successive causes of action.

Vendor and vendee.

Entry by landlord.

(*p*) *Mills v. East London Union*, (1872) L. R. 8 C. P. 79; *Henderson v. Thorn*, [1893] 2 Q. B. 164, per Wills, J., at p. 166; cf. *Doe d. Worcester School Trustees v. Rowlands*, (1841) 9 C. & P. 734; *Ebbetts v. Conquest*, [1895] 2 Ch. 377; [1896] A. C. 490; (1900) 82 L. T. 560.

(*q*) *Vivian v. Champion*, (1705) 2 Ld. Raym. 1125.

(*r*) *Vide supra*, p. 65; cf. *Morgan v. Hardy*, (1886) 17 Q. B. D. 770, per Denman, J., at p. 779.

(*s*) *Coward v. Gregory*, (1866) L. R. 2 C. P. 153; *Jacob v. Down*, [1900] 2 Ch. 156.

(*t*) *Coward v. Gregory*, *ubi supra*; cf. *Ebbetts v. Conquest*, (1900) 82 L. T. 560; *Henderson v. Thorn*, [1893] 2 Q. B. 164.

(*u*) *Phillips v. Silvester*, (1872) L. R. 8 Ch. 173.

(*x*) *Royal Bristol Building Society v. Bomash*, (1887) 35 Ch. D. 390.

(*y*) Cf. *Williams v. Williams*, (1874) L. R. 9 C. P. 659, per Brett, J., at p. 667; *vide Foa on Landlord and Tenant* (4th ed.), at p. 235; cf., however, *Joyner v. Weeks*, [1891] 2 Q. B. 31, per Wright, J., at p. 35.

notice can only recover nominal damages upon the general covenant to repair (z).

If, however, there exist a special covenant to repair after notice, and the landlord enter upon the premises after the expiration of the notice and himself execute the necessary repairs, with or without his tenant's consent, he may recover as damages the cost of such repairs (a). Without a covenant of indemnity, a lessee who has underleased his premises cannot recover from the under-lessee, upon breach of covenant to repair, which results in forfeiture of the lease to the superior landlord, any damages in respect of such forfeiture (b).

It is to be noted that, in the absence of an express stipulation, the landlord has no right to enter upon the premises in order to himself execute repairs which the lessee should undertake, even though forfeiture may result (c).

Different liabilities under lease and sub-lease.

Furthermore, it is to be noted that, in the case of under-leases, although the original lease and the sub-lease may contain covenants to repair which are identical in form, nevertheless the liability thereunder may greatly differ (d).

Consequently, a lessee cannot recover from his sub-lessee the costs of an action brought by the superior landlord for non-repair against the original lessee (e).

It is, however, to be noted that the point has not been expressly decided by a court of appeal since the date of *Hadley v. Baxendale*, (1854) 9 Exch. 341, and it cannot be regarded as being beyond all doubt (f).

Breach of covenant prior to execution of lease.

A landlord can only recover nominal damages for breach of covenant to repair committed by his tenant at a date prior to the execution of the lease, even although the habendum of the lease states that the premises were held by the tenant at the time of the breach (g).

Initial repairs to be executed by landlord.

A landlord who has covenanted to himself execute initial repairs cannot sue his tenant for breach of covenant to repair without duly performing the precedent condition (h). The precedent condition, however, may be such, as for example where it applies to several distinct sets of premises, that it is divisible, in which case the covenant might be regarded as multiple in character (i).

(z) *Williams v. Williams*, (1874) L. R. 9 C. P. 659.

(a) *Colley v. Streeton*, (1823) 2 B. & C. 273.

(b) *Logan v. Hall*, (1847) 4 C. B. 598; cf. *Clow v. Brogden*, (1840) 2 M. & G. 39.

(c) *Stocker v. Planet Building Society*, (1879) 27 W. R. 877.

(d) *Penley v. Watts*, (1841) 7 M. & W. 601; *Pontifex v. Foord*, (1884) 12 Q. B. D. 152.

(e) *Walker v. Hatton*, (1842) 10 M. & W. 249; cf. *Ebbetts v. Conquest*, [1895] 2 Ch. 377, per Lindley, L.J., at p. 382; *Clare v. Dobson*, [1911] 1 K. B. 35.

(f) Cf. *Hammond v. Bussey*, (1887) 20 Q. B. D. 79.

(g) *Smith v. Kay*, (1847) 1 Ex. 412.

(h) *Neale v. Ratcliff*, (1850) 15 Q. B. 916; cf. *Coward v. Gregory*, (1866) L. R. 2 C. P. 153.

(i) *Neale v. Ratcliff*, *ubi supra*, per Wightman, J., at p. 927.

An assignee of a lease which has been successively assigned to several persons can only be made liable in respect of damages accruing during his own occupation of the demised premises. But, the onus of proving antecedent disrepair is thrown upon the assignee against whom the action is brought (*k*).

Successive assignees.

It is somewhat beyond the scope of this work to discuss the precise significance of the various covenants dealing with the repair of premises which may be contained in a lease. In brief, however, it may be laid down that damages can be claimed in accordance with the following rules.

A covenant to "keep" premises in repair and to deliver them up in repair is to be interpreted as involving, if need be, a primary duty to put them in repair (*l*). It would therefore appear that, in accordance with a strict interpretation of the law as laid down in *Smith v. Peat* (*vide supra*), an assignee of leased premises might be under a primary duty to make good disrepair caused or permitted by his predecessor in occupation (*m*).

Interpretation of repairing covenants.

A covenant to "put premises into repair" involves a duty on the part of the tenant to put them into a better condition of repair than that subsisting at the date of the execution of the lease (*n*). Structural alterations may constitute a breach of covenant to repair (*o*).

In an action upon the covenant to deliver up in repair, the tenant is entitled, in the assessment of damages, to have deducted such sum as may represent the normal diminution in value of the premises caused by lapse of time and exposure to the elements (*p*).

In determining what degree of repair a landlord is entitled to expect from his tenant, the following factors must be considered: (1) the state of the premises at the date of the execution of the lease (*q*); (2) the class of persons who might reasonably be regarded as possible tenants (*x*); (3) the nature of the premises and the purposes of occupation to which they may reasonably be put (*r*); (4) the locality in which the premises are situated (*s*).

(*k*) *Smith v. Peat*, (1853) 9 Ex. 161; cf. *Plummer v. Johnson*, (1902) 18 T. L. R. 316.

(*l*) *Payne v. Haine*, (1847) 16 M. & W. 541; cf. *Proudfoot v. Hart*, (1890) 25 Q. B. D. 42, per Lord Esher, M.R., at p. 50; *Saner v. Bilton*, (1878) 7 Ch. D. 815, per Fry, J., at p. 821.

(*m*) *Plummer v. Johnson*, (1902) 18 T. L. R. 316.

(*n*) *Belcher v. McIntosh*, (1839) 8 C. & P. 720.

(*o*) *Rose v. Hyman*, [1911] 2 K. B. 234; cf. however, (1912) 28 T. L. R. 432.

(*p*) Cf. *Gutteridge v. Munyard*, (1834) 1 M. & Rob. 334, per Tindal, C.J., at p. 336; *Henderson v. Thorn*, [1893] 2 Q. B. 164, at p. 165; *Terrell v. Murray*, (1901) 17 T. L. R. 570; *Torrens v. Walker*, [1906] 2 Ch. 166, per Warrington, J., at p. 173.

(*q*) *Belcher v. McIntosh*, (1839) 8 C. & P. 720, per Alderson, B., at p. 723; *Pontifex v. Foord*, (1884) 12 Q. B. D. 152; *Torrens v. Walker*, [1906] 2 Ch. 166; cf. *Yates v. Dunster*, (1855) 11 Ex. 15.

(*r*) *Saner v. Bilton*, (1878) 7 Ch. D. 815, per Fry, J., at p. 821; cf., however, *McLure v. Little*, (1868) 19 L. T. 287.

(*s*) *Payne v. Haine*, (1847) 16 M. & W. 541, per Parke, B., at p. 545; *Proudfoot*

It is 'difficult to reconcile in a logical manner all the cases bearing on the subject of repair, but their effect may, broadly, be summed up by saying, that although in defence to an action for breach of covenant to repair it is not necessarily sufficient to prove that the premises were in a bad condition of repair at the date of the execution of the lease (*t*), nevertheless evidence as to the general state of repair of the demised premises at the date of the execution of the lease is clearly admissible (*u*).

This evidence may be directed to showing the intention of the covenant and disposing of the whole cause of action, or to the reduction of damages (*x*), but it must not be too detailed in character (*y*).

Date to which damages may be claimed.

There is ancient authority for saying that in an action for breach of covenant to repair the court may give damages in respect of disrepair occurring after action brought and before verdict given, even, although one or more successive causes of action may have accrued. In other words, the court may award such sum as at the date of assessment will suffice to completely indemnify the plaintiff in respect of all damage then subsisting (*z*). Nowadays the amount would, of course, represent the damage done to the reversion. In an action for breach of covenant to deliver up in repair, no subsequent liability to repair on the part of the defendant can accrue between the commencement of the action and the date of assessment of damages (*a*).

Degree of liability under repairing covenant the same whether made by lessor or lessee.

Illustration of lessor's liability.

Covenants to repair involve the same degree of liability, whether made by the lessor or lessee (*b*). An instructive case upon the liability of lessor to lessee under such a covenant is that of *Green v. Eales*, (1841) 2 Q. B. 225. In that case it was decided that, upon breach by the lessor of a covenant to repair and keep in repair, the lessee could recover damages in respect of injury to part of the premises which the lessor had not covenanted to repair, such injury having directly accrued from failure to repair a portion of the premises which did come within the scope of the covenant.

Furthermore, apparently, damages might have been specially claimed in respect of the lessor's delay in commencing repairs (*c*).

v. Hart, (1890) 25 Q. B. D. 42, *per* Lord Esher, M.R., at p. 51; *cf. Stanley v. Towgood*, (1836) 3 Bing. N. C. 4.

(*t*) *Payne v. Haine*, (1847) 16 M. & W. 541; *Proudfoot v. Hart*, (1890) 25 Q. B. D. 42; *Belcher v. McIntosh* (1839) 8 C. & P. 720; *Lurcott v. Wakeley and Wheeler*, [1911] 1 K. B. 905.

(*u*) *Gutteridge v. Munyard*, (1834) 1 M. & Rob. 334; *Harris v. Jones*, (1832) 1 M. & Rob. 173; *cf. Lister v. Lane*, [1893] 2 Q. B. 212; *Brown v. Trumper*, (1858) 26 Beav. 11; *Lurcott v. Wakeley and Wheeler*, *ubi supra*.

(*x*) *Cf. Burdett v. Withers*, (1837) 7 A. & E. 136, *per* Lord Denman, C.J., at p. 138.

(*y*) *Mantz v. Goring*, (1838) 4 Bing. N. C. 451.

(*z*) *Cf. Shortbridge v. Lamplugh*, (1702) 2 Ld. Raym. 803; *cf. R. S. C.*, Ord. XXXVI., r. 58, *vide supra*, p. 21.

(*a*) *Cf.*, however, *Woods v. Pope*, (1835) 6 C. & P. 782; 1 Bing. N. C. 467.

(*b*) *Cf. Torrens v. Walker*, [1906] 2 Ch. 166, *per* Warrington, J., at p. 174.

(*c*) *Green v. Eales*, (1841) 2 Q. B. 225, *per* Lord Denman, C.J., at p. 238.

Damages could not, however, be recovered in respect of the expense incurred by the lessee in taking another house during the repairs (*d*).

It is to be noted that in cases where there exists a covenant by the lessor to keep in repair, the latter must receive notice of want of repair before his liability can arise (*e*). It would appear that such notice must be expressly given by the tenant himself (*f*).

Such a covenant carries with it an implied right of entry to the lessor (*g*).

Finally, it may be observed that a covenant by the lessor to repair may render him liable to a stranger for injuries or nuisance arising from disrepair (*h*).

The act or omission complained of must, however, be in the nature of a public nuisance (*i*).

SECTION V.

Recovery of Rent.

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Most leases, in addition to a rent-reserving clause, contain an express covenant on the part of the lessee to pay the specified rent. Such a covenant is not strictly necessary, since the lessee is under a liability to pay the rent by the actual vesting of the estate in him, upon the execution of the deed, and such liability persists until the estate so vested is destroyed (*k*); though the liability may be made expressly dependent upon the performance by the lessor of a condition precedent (*l*).

Covenant to pay rent not strictly necessary.

The measure of damages for breach of a covenant to pay rent is the amount of rent claimed as being in arrear, together with interest thereon from the time when the rent was payable, at a rate not exceeding the current rate of interest (*m*).

Measure of damages.

In the case of mining leases, there are frequently two separate rents stipulated: first, a dead rent, *i.e.*, a rent payable whether

Mining rents.

(*d*) Cf., however, *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

(*e*) *Makin v. Watkinson*, (1870) L. R. 6 Ex. 25.

(*f*) *Hugall v. McLean*, (1885) 53 L. T. 94; cf. *Torreus v. Walker*, [1906] 2 Ch. 166.

(*g*) *Saner v. Bilton*, (1878) 7 Ch. D. 815.

(*h*) *Payne v. Rogers*, (1794) 2 H. Bl. 349; cf. *Russell v. Shenton*, (1842) 3 Q. B. 449.

(*i*) *Payne v. Rogers*, *ubi supra*; cf. *Cavalier v. Pope*, [1906] A. C. 428; *Malone v. Laskey*, [1907] 2 K. B. 141, at p. 151.

(*k*) *Ward (Lord) v. Lumley*, (1860) 5 H. & N. 87, 656, *per* Martin, B., at p. 657.

(*l*) *Brook v. Fletcher*, (1877) 37 L. T. 100.

(*m*) 3 & 4 Will. 4, c. 42, s. 28.

the mines be worked or not; secondly, a royalty upon the minerals actually raised. The dead rent remains payable even although the mine become exhausted or unworkable (*n*), since such a lease may be regarded as an out and out sale of a portion of the land demised (*o*).

Rent payable despite destruction of premises.

A rent is none the less payable by reason of the premises being burnt down or rendered untenable, unless there is an express clause in the lease exempting the lessee from payment under such circumstances (*p*).

Apportionment.

Rent which has become due may require to be apportioned, either in respect of estate or of time, or in respect of both estate and time.

Apportionment in respect of Estate.

Apportionment by act of parties.

Apportionment may arise at common law by the act of the parties. Thus, if the lessor dispose, either by deed or will, of the reversion in part of the lands demised, the rent becomes apportionable (*q*); since, rent being incident to the reversion, a proportionate part of it passes *ipso facto* with such disposal (*q*). But the consent of the lessee is imperative, if the apportionment is to be binding upon him, unless the apportionment be made by a jury (*r*).

Apportionment according to value—not according to quantity.

Similarly, if the lessee, or (probably) the lessee's assignee, surrender a portion of the land to the lessor, the rent for the remainder will be apportioned (*s*)—upon a basis of value, not of quantity (*s*). The rent will be similarly apportioned according to the value at the date of severance, in cases where a lessee assigns a part of the demised premises (*t*).

Eviction by title paramount.

If the lessee or the lessee's assignee be evicted from a portion of the land by title paramount, he will have to pay a proportionate rent, according to value (*u*), for the remainder left to him (*x*). If, however, the lessee be evicted from a portion of the land by his landlord or persons claiming under his landlord,

Eviction by landlord.

(*n*) *Bute (Lord) v. Thompson*, (1844) 13 M. & W. 487; cf. *Jefferys v. Fairs*, (1876) 4 Ch. D. 448; *Watson v. Charlesworth*, [1905] 1 K. B. 155; affirmed [1906] A. C. 14; cf., however, *Clifford (Lord) v. Watts*, (1870) L. R. 5 C. P. 577.

(*o*) *Gowan v. Christie*, (1873) L. R. 2 H. L. (Sc.) 273, per Lord Cairns.

(*p*) *Saner v. Bilton*, (1878) 7 Ch. D. 815; *Manchester Bonded Warehouse Co. v. Carr*, (1880) 5 C. P. D. 507; *Izon v. Gorton*, (1839) 5 Bing. N. C. 501; cf., however, *Bac. Abr. Rent (L.)*, and *vide infra*, p. 73.

(*q*) *West v. Lassels*, (1601) Cro. Eliz. 851.

(*r*) *Bliss v. Collins*, (1822) 5 B. & Ald. 876; cf. *Mayor of Swansea v. Thomas*, (1882) 10 Q. B. D. 48, per Pollock, B., at p. 51.

(*s*) *Smith v. Malings*, (1608) Cro. Jac. 160; cf. *Baynton v. Morgan*, (1888) 22 Q. B. D. 74.

(*t*) *Salts v. Battersby*, [1910] 2 K. B. 155.

(*u*) *Hartley v. Maddocks*, [1899] 2 Ch. 199.

(*x*) *Gilb. Rents*, 147; *Stevenson v. Lambard*, (1802) 2 East, 575.

there is a complete suspension of the whole rent (*y*), unless the eviction ensued upon some wrongful act of the lessee which justified the eviction (*z*).

Where a demise—not under seal—was made of lands, a certain small part of which had been previously leased by the lessor, for a period extending beyond the duration of the later demise, it was held that the whole rent was suspended—the impediment to the lessee taking possession of his entire property being different from an eviction by title paramount (*a*).

But in another case, where, under similar circumstances, the demise was under seal, it was held to operate as a grant of the reversion in the portion previously demised, so that the lessee became liable for the entire rent (*b*).

On the other hand, it has been held that the effect of a tenant being unable to obtain possession of the entire premises demised to him is equivalent, so far as suspending an action for rent is concerned, to an eviction by the landlord (*c*).

Apportionment may also arise by act of law. Thus, where freehold and leasehold premises are let together at one rent, an apportionment takes place, at the death of the lessor, among the real and personal representatives (*d*)—subject, however, to the provisions of 60 & 61 Vict. c. 65, s. 1.

Apportionment by act of law.

Apportionment arises by act of law in cases where a part of the land demised becomes totally lost to the tenant through the act of God, *e.g.*, an overflow of the sea (*e*).

In the case of fire, the tenant is not totally deprived of all use of the land, and therefore no apportionment occurs (*f*).

As has previously been mentioned, apportionment takes place upon eviction of the lessee from a portion of the demised land by title paramount (*g*).

Where land and goods are leased together at an entire rent, and the lessee is evicted from the lands, no apportionment can be made for the goods, since the rent is held to issue from the land alone (*h*). But where the mortgagor of a house let it furnished, and the tenant, after notice, paid the whole rent to the mortgagee, it was held that the mortgagor might none the less recover for the use of the furniture (*i*).

(*y*) *Morrison v. Chadwick*, (1849) 7 C. B. 283; Bac. Abr. Rent (M. 1).

(*z*) *Walker's Case*, (1587) 3 Co. Rep. 22, at p. 22.

(*a*) *Neale v. Mackenzie*, (1836) 1 M. & W. 747.

(*b*) *Ecc. Commrs. of Ireland v. O'Connor*, (1858) 9 Ir. Com. L. Rep. 242.

(*c*) *Holgate v. Kay*, (1844) 1 C. & K. 341; cf. *Watson v. Ward*, (1853) 8 Exch. 335, at p. 340.

(*d*) Bac. Abr. Rent (M. 2); cf. *Doe d. Vaughan v. Meyler*, (1814) 2 M. & S. 276.

(*e*) 1 Roll. Abr. 236; Bac. Abr. Rent (M. 2).

(*f*) Bac. Abr. Rent (M. 2).

(*g*) *Vide supra*, p. 72.

(*h*) *Emott v. Cole*, (1590) Cro. Eliz. 255.

(*i*) *Salmon v. Matthews*, (1841) 8 M. & W. 827.

Apportionment under statute.

Apportionment of rent, in respect of estate, is provided for by certain statutes, in cases where land subject to a lease is required to be taken for public or quasi-public purposes. The chief statute of this kind is the Lands Clauses Consolidation Act, 1845 (*k*), but there are numerous others of minor importance (*l*).

Apportionment in respect of Time.

No apportionment in respect of time at common law.

At common law there could be no apportionment of rent in respect of time (*n*). Hence, where a tenancy is determined in the middle of a rent-period, the entire rent for such period is lost—at common law (*n*).

Apportionment under statute.

The above common law rule has now been greatly modified by statute.

Distress for Rent Act, 1737.

The earliest modifying statute is the Distress for Rent Act, 1737 (11 Geo. 2, c. 19). Section 15 of this Act provides that where any tenant for life dies before, or on, the day on which any rent is payable upon any demise, which determines on the death of such tenant for life, his executors or administrators may recover from the lessee a due proportionate rent.

Apportionment Act, 1834.

By the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), s. 1, the provisions of the Act of 1737 are extended to all rents payable under demises which determine upon the death of the lessor (even though not strictly a tenant for life) or upon the death of the person during whose life the lessor is entitled.

Section 2 of the latter Act provides that all rents reserved on a lease made after 1834, coming due at fixed periods, shall be apportioned so that on the death of any person interested in any such rents, or on the determination by any other means of the interest of such person, he or his executors shall be entitled to a proportionate rent from the date of the last preceding fixed period.

The Apportionment Act, 1834, only applies to cases in which the interest of the person interested in the rents to be apportioned is terminated by his own or some other person's death (*o*), and does not provide for apportionment as between the real and personal representatives of a tenant in fee simple (*o*). Furthermore, the Act gives no right to an apportioned rent unless the person interested could have claimed the entire rent upon the due expiration of the fixed rent period (*p*). The Act does not apply to cases arising out of oral leases (*q*).

(*k*) 8 & 9 Vict. c. 18, s. 119.

(*l*) Cf. 17 & 18 Vict. c. 32 (Church Building Act); 8 Edw. 7, c. 28, s. 23 (Agricultural Holdings Act).

(*m*) *Chun's Case*, (1613) 10 Co. Rep. 127a., at p. 128a.

(*n*) *Hall v. Burgess*, (1826) 5 B. & C. 332; *Slack v. Sharpe*, (1838) 8 A. & E. 366.

(*o*) *Beer v. Beer*, (1852) 12 C. B. 60; *In re Clulow's Estates*, (1857) 3 K. & J. 689.

(*p*) *In re Lord Anglesey's Estate*, (1874) L. R. 17 Eq. 283.

(*q*) *Mills v. Trumper*, (1869) L. R. 4 Ch. 320.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2, provides that all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Apportionment Act,
1870.

Section 3 of the same Act provides that the apportioned part of any such rent, annuity, etc., shall be payable or recoverable in the case of a continuing rent, annuity, etc., when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, etc., determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable, if the same had not been so determined, and not before.

Section 4 provides the appropriate remedies for the recovery of apportioned rent.

Section 7 provides that the Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place. There is a similar provision in the Act of 1834: *see* section 3 thereof.

The Act of 1870 would clearly appear to be retrospective in the sense of applying to instruments made, or even coming into operation, before the date of the Act (*r*), though there is a dictum to the contrary (*s*).

Double Value.—It is provided by the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 1, that in case any tenant of lands, or person coming into possession under or by collusion with such tenant, shall wilfully hold over such lands after the determination of the tenancy, and after demand made and notice in writing given for delivering possession thereof by the landlord, lessor, or reversioner, or his duly authorised agent (*t*), such tenant, or other person holding over, shall pay for such period as the lands are held over at the rate of double the yearly value of the lands.

Double value.
Landlord and
Tenant Act,
1730.

This statute does not apply to weekly tenancies (*u*), nor to tenancies from quarter to quarter (*x*).

(*r*) *Capron v. Capron*, (1874) L. R. 17 Eq. 288; *Re Cline's Estate*, (1874) L. R. 18 Eq. 213; *Lawrence v. Lawrence*, (1884) 26 Ch. D. 795.

(*s*) *Jones v. Ogle*, (1872) L. R. 8 Ch. 192, *per* Lord Selborne, at p. 195. This Act renders dividends apportionable, first as between the executors and legatee for life, and secondly as between the legatee for life and the residuary legatee, in cases where stocks or shares are bequeathed to a legatee for life, and afterwards to fall into the residue (*Pollock v. Pollock*, (1874) L. R. 18 Eq. 329). If trustees sell stock cum dividend, after a tenant for life's death, for division among remaindermen, this Act does not apply, and the tenant for life's estate is not entitled to any sum in respect of the dividend accruing at his death (*Bulkeley v. Stephens*, [1896] 2 Ch. 241).

(*t*) *Cf. Poole v. Warren*, (1838) 8 A. & E. 582.

(*u*) *Lloyd v. Rosbee*, (1810) 2 Camp. 453.

(*x*) *Cf. Wilkinson v. Hall*, (1837) 3 Bing. N. C. 508, at pp. 531 and 533.

Statute a penal one, and does not apply in case of *bonâ fide* mistake.

The required notice in writing must be in proper form (*y*). The statute is a penal one and is to be strictly construed (*z*). For the statute to apply, the tenant must hold over wilfully. In short, his action must be contumacious and not merely due to a *bonâ fide* mistake (*a*).

Who may sue.

An action under the statute may be brought by the landlord or lessor or other person standing in his place, *e.g.*, the assignee of the immediate reversion (*b*). But a tenant to whom a fresh lease has been granted, to commence upon the expiration of the defendant's tenancy, may not sue (*c*).

Measure of Damages.

As has already been stated, the damages recoverable under this statute are "at the rate of double the yearly value of the lands, tenements, etc., . . . for so long a time as the same are detained." The amount recoverable may therefore—designedly—be greater than double rent (*d*).

In determining such value "the soil itself, and everything which by having been attached to it becomes part of the soil, is no doubt to be estimated, as well as that of all easements, rights and appurtenances thereto belonging or joined therewith; and that value is what an occupier would give, and the landlord would otherwise have received for the use of the freehold and everything connected with it during the time that the possession is withheld" (*e*).

But where rent or compensation is paid jointly for the use of the tenement and something else entirely collateral, the latter factor should be disregarded in assessing damages under this statute (*f*).

A landlord may waive his right to double value (*g*).

Double value not recoverable by distress.

Double value cannot be distrained for, since it is not in the nature of rent, but of unliquidated damages recoverable by action under the statute (*h*).

A landlord, after recovering the possession of demised premises by ejectment, may, none the less, recover double value for the time during which the premises were held over prior to

(*y*) *Page v. More*, (1850) 15 Q. B. 684.

(*z*) *Cf. Lloyd v. Rosbee*, (1810) 2 Camp. 453; *Robinson v. Learoyd*, (1840) 7 M. & W. 48, 54.

(*a*) *Soulsby v. Neving*, (1808) 9 East, 310; *Swinfen v. Bacon*, (1861) 6 H. & N. 184, 846.

(*b*) *Blatchford v. Cole*, (1858) 5 C. B. N. S. 514; *cf. Harcourt v. Wyman*, (1849) 3 Exch. 817, *per Parke, B.*, at p. 825; *Poole v. Warren*, (1838) 8 A. & E. 582.

(*c*) *Blatchford v. Cole*, *ubi supra*.

(*d*) *Cf. Timmins v. Rowlinson*, (1765) 3 Burr. 1603, *per Wilmot, J.*, at p. 1608.

(*e*) *Robinson v. Learoyd*, (1840) 7 M. & W. 48, *per Parke, B.*, at p. 53.

(*f*) *Robinson v. Learoyd*, *ubi supra*, at p. 54.

(*g*) *Rawlinson v. Marriott*, (1867) 16 L. T. 207; *cf. Ryal v. Rich*, (1808) 10 East, 48.

(*h*) *Timmins v. Rowlinson*, *ubi supra*, at p. 1608.

the date of ejection(*i*). But where the landlord intends to employ both remedies, he should join his claim for double value with that for recovery of the land in one action under Ord. XVIII., r. 2, R. S. C. (*k*).

An action under this statute must be brought within two years of the date when the cause of action first accrued(*l*). It may be brought in the county court if the claim does not exceed 100*l.* (*m*).

Action must be brought within two years.

Double Rent.—It is provided by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18, that in case any tenant shall give notice of his intention to quit the premises held by him at a date mentioned in such notice, and shall not deliver up possession at such date, he shall pay double rent during such period as he shall continue in possession after such date.

Double rent. Distress for Rent Act, 1737.

This statute, unlike the last-mentioned one for double value, applies to cases even where the tenant does not act contumaciously, and also to cases where merely oral notice is given and where the demise itself is oral(*n*). A landlord cannot both claim double rent and mesne profits.

Statute applies even to cases of *bond fide* mistake.

Furthermore, sums due under this statute may be recovered by distress(*o*).

Double rent recoverable by distress.

But the statute only applies to cases in which the tenant actually has the power to determine his tenancy by notice and has duly tendered a valid notice to quit(*p*).

A landlord waives his right to double rent by accepting single rent in respect of a period subsequent to the notice(*q*); but a tenant who "holds over" and pays double rent may, none the less, quit at any time he may choose, without giving any fresh notice(*r*).

Waiver by landlord.

Actions under this statute for sums under 100*l.* may usually be brought in the county court(*s*).

A tenant may, of course, in certain cases, deduct from the rent due to his landlord sums paid by him on his landlord's behalf, *e.g.*, rates. This subject is fully dealt with in the section on Covenant to pay Rates and Taxes, *vide supra*, pp. 57, 58.

Deductions.

Use and Occupation.—In order to maintain an action for use

Use and occupation.

(*i*) *Soulsby v. Neving*, (1808) 9 East, 310.

(*k*) Cf. *Williams v. Hunt*, [1905] 1 K. B. 512.

(*l*) 3 & 4 Will. 4, c. 42, s. 3.

(*m*) *Blatchford v. Cole*, (1858) 5 C. B. N. S. 514.

(*n*) Cf. *Timmins v. Rowlinson*, (1765) 3 Burr. 1603. In *Sullivan v. Bishop*, (1826) 2 C. & P. 359, the Act was held not to apply to a weekly tenancy, but probably this case is of no authority. *Vide* Woodfall's Landlord and Tenant (18th ed.), at p. 833.

(*o*) *Timmins v. Rowlinson*, *ubi supra*, at p. 1608; *Humberstone v. Dubois*, (1842) 10 M. & W. 765.

(*p*) *Johnstone v. Huddleston*, (1825) 4 B. & C. 922.

(*q*) *Doe d. Cheney v. Batten*, (1775) Cowp. 243.

(*r*) *Booth v. Macfarlane*, (1831) 1 B. & Ad. 904.

(*s*) Cf. *Wickham v. Lee*, (1848) 12 Q. B. 521.

and occupation, it is sufficient to show that the defendant used and occupied premises by permission of the plaintiff (*t*). It is not necessary to postulate the existence of a demise or of an express contract (*t*). This form of action may at common law be maintained where there has been a mere agreement express or implied, but not where there has been an actual demise (*u*). But it is provided by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 14, that the plaintiff shall only be nonsuited if the demise be by deed (*x*). If the demise be not under seal, the above section provides that the rent reserved therein may be advanced at the trial, as a measure of the quantum of damages payable to the plaintiff.

An eviction by the landlord of the defendant from part of the premises will totally suspend any claim for use and occupation subsequent to such eviction (*y*); just as partial eviction by a landlord suspends any claim for rent (*z*).

A lessee who has never entered to take possession as tenant cannot be sued in this form of action (*a*), neither can a wilful trespasser (*b*).

Measure of Damages.

In this form of action there is a presumption that no actual specific rent has been agreed upon, and the plaintiff is entitled to recover compensation for the use and occupation he has permitted (*c*).

But, in estimating such compensation, no inquiry is made as to the profit resulting from cultivation, or as to the property being cultivated at all (*d*).

Where there exists an actual agreement as to the amount of rent payable, such rent will probably constitute the measure of damages (*e*), although the agreement in other respects may be void by the Statute of Frauds (*f*).

If the defendant is prevented, by an eviction by title paramount, from complete enjoyment of what the landlord purported

(*t*) *Rochester (Dean of) v. Pierce*, (1808) 1 Camp. 466, *per* Lord Ellenborough, at p. 467; *cf. Levy v. Lewis*, (1861) 9 C. B. N. S. 872; *Gibson v. Kirk*, (1841) 1 Q. B. 850, *per* Denman, C.J., at p. 856.

(*u*) *Churchward v. Ford*, (1857) 2 H. & N. 446, *per* Bramwell, B., at p. 449; *cf.* 6 A. & E. 839, *note*.

(*x*) *Cf. Elliott v. Rogers*, (1801) 4 Esp. 59.

(*y*) *Reeve v. Bird*, (1834) 1 C. M. & R. 31.

(*z*) *Vide supra*, pp. 72, 73.

(*a*) *Edge v. Stafford*, (1831) 1 C. & J. 391, 398; *cf. Jones v. Reynolds*, (1836) 7 C. & P. 335.

(*b*) *Tew v. Jones*, (1844) 13 M. & W. 12.

(*c*) *Cf. Tomlinson v. Day*, (1821) 2 Brod. & B. 680; *Thetford (Mayor of) v. Tyler*, (1845) 8 Q. B. 95.

(*d*) 1 Man. & Gr. 312, *note*.

(*e*) *Vide supra*, p. 78; *Gretton v. Mees*, (1878) 7 Ch. D. 839; *cf. Thetford (Mayor of) v. Tyler*, *ubi supra*.

(*f*) *De Medina v. Polson*, (1815) Holt, N. P. 47.

to grant him, the amount of rent reserved by the agreement may be disregarded, and the jury may determine what sum they consider reasonable for such use and occupation as the defendant enjoyed (*g*).

Similarly, where the plaintiff fails to duly perform a condition precedent, *e.g.*, repair the premises, he cannot recover or distrain for the agreed rent (*h*), but can only recover a sum reasonable in all the circumstances of the case (*i*).

The defendant cannot claim any deduction of rent in respect of acts done by a third party which diminish the value of his occupation, but which were committed without the authority of the plaintiff (*k*). Thus, a tenant whose premises were injuriously affected by works carried out on adjoining land by a public body under the Lands Clauses Consolidation Act, 1845, would be unable to claim any abatement, in respect thereof, from his own landlord.

The landlord's right to compensation for use and occupation accrues *de die in diem* (*l*).

Since the action is one for unliquidated damages it cannot apparently be commenced by a specially indorsed writ (*m*). Although there may be an agreed rent, nevertheless, in this action, such amount can only be proved as evidence of quantum, and cannot be directly claimed (*n*).

For the same reason, namely, that the damages are unliquidated, it would appear that interest cannot be recovered under 3 & 4 Will. 4, c. 42, s. 28, upon a claim for use and occupation.

(*g*) *Tomlinson v. Day*, (1821) 2 Brod. & B. 680.

(*h*) *Mechelen v. Wallace*, (1836) 6 N. & M. 316.

(*i*) *Smith v. Eldridge*, (1854) 15 C. B. 236.

(*k*) *Drury Lane Theatre Co. v. Chapman*, (1843) 1 C. & K. 14.

(*l*) *Packer v. Gibbins*, (1841) 1 Q. B. 421, *per* Patteson, J., at p. 423.

(*m*) *Gurney v. Small*, [1891] 2 Q. B. 584.

(*n*) Cf. 11 Geo. 2, c. 19, s. 14.

CHAPTER IV.

Damages in relation to Personal Property.

- Section I.—Sale of Goods.
 „ II.—Stocks and Shares, including contracts for the sale thereof.
 „ III.—Conversion, Detinue, Trespass, Distress, Replevin.

THE law relating to personal property differs so fundamentally, and in so many respects, from the law relating to real property, that the subject of damages in relation to personal property can most conveniently be treated in a separate chapter devoted exclusively to it.

SECTION I.

Sale of Goods.

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A sale of goods must necessarily be effected by means of a contract of some kind. Such contract may give rise to an action by the vendor for the price of the goods delivered and accepted or for damages for non-acceptance. On the other hand, such contract may give rise to an action by the vendee for non-delivery or for delay in delivery, or for breach of warranty of title or for breach of warranty of quality.

Damages recoverable by Vendor for Price of Goods delivered and accepted.

Measure of
damages.

The measure of damages recoverable by the vendor when his goods have been delivered and accepted is, of course, the price stated in the contract, or, in the absence of any price previously agreed upon, such sum as the court may determine as fairly representing the value of the goods sold (a).

If the goods are marketable, their value, in the absence of express agreement as to price, would probably be the market

(a) *Vide* Sale of Goods Act, 1893 s. 8 ; cf. *Valpy v. Gibson*, (1847) 4 C. B. 837, *per* Wilde, C.J., at p. 864.

price of such goods at the date of the sale; though special circumstances may be taken into account if they exist (*b*).

Interest may or may not be recoverable. On this point reference should be made to Chap. II., Section III., *supra*.

If, however, the vendee allege that there has been a breach of warranty on the part of the seller, he may "set up against the seller the breach of warranty in diminution or extinction of the price" (*c*).

In such a case the "loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty" (*c*). (*Vide infra*, pp. 88, 92).

Such loss, it should be noted, need not be pleaded as a counter-claim and made the subject of a cross-action. (*Vide infra*, p. 92.) It may be pleaded in the defence to the claim for price.

Where goods are sold under a contract, by the terms of which the vendee is to pay for them by a bill of exchange, and the vendee fails to give the bill in due course, the vendor cannot bring an action for the price of goods sold and delivered until after the date when such bill would have fallen due (*d*).

Payment by
bill of
exchange.

The vendor, may, however, prior to the date when such bill should have fallen due, bring a special action on the case for damages for breach of contract in not giving such bill (*d*), and he may recover therein as unliquidated damages the full amount of the bill (*e*).

In cases where, by the terms of the contract of sale, the property in the goods may be deemed to have passed to the vendee before actual delivery, the vendor may at any time after the passing of the property recover from the vendee the price of the goods sold (*f*). In such cases there may be said to have been "constructive" delivery.

Where
property
passes before
delivery.

Again, in cases where, under a contract of sale, the price is payable on a certain day irrespective of delivery, the vendor may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract (*g*).

Payment
irrespective
of delivery.

Damages recoverable by Vendor against Vendee for Non-acceptance.

As has just been stated above, actual delivery of the goods is not necessarily, in every case, a condition precedent to the

(*b*) Cf. *Acebal v. Levy*, (1834) 10 Bing. 376, *per Tindal*, C.J., at p. 383.

(*c*) Sale of Goods Act, 1893, s. 53; cf. *Street v. Blay*, (1831) 2 B. & Ad. 456; *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

(*d*) *Mussen v. Price*, (1803) 4 East, 147.

(*e*) *Hutchinson v. Reid*, (1813) 3 Camp. 329.

(*f*) *Alexander v. Gardner*, (1835) 1 Bing. N. C. 671; cf. *Greaves v. Hepke*, (1818) 2 B. & Ald. 131.

(*g*) Cf. Sale of Goods Act, 1893, s. 49; *Dunlop v. Grote*, (1845) 2 C. & K. 153.

vendor's maintaining an action for their price against the vendee.

In every case, however, where the vendee refuses to accept and duly pay for the goods purported to be sold to him, the vendor can elect to treat the contract as broken, even though the property in the goods may have passed to the vendee, and can sue for damages for breach of contract (*h*).

Furthermore, in cases where the vendor has not actually transferred to the vendee the property in the goods, the breach by the vendee of his promise to accept and pay can only affect the vendor by way of damages. The goods still remain the property of the vendor. He may resell them or not at his pleasure (*h*).

His only action against the vendee is for damages for non-acceptance, except in the case of contracts of sale in which the price is payable on a certain day irrespective of delivery. (*Vide supra*, p. 81.)

Measure of damages.

The vendor can, in general, only recover the damage that he has sustained, not the full price of the goods (*i*).

Where there is a market for the goods.

The ordinary measure of damages accruing to a vendor in case of non-acceptance of goods is the difference between the contract price and the market price of the goods at the time when the contract is broken; since the seller may take his goods into the market and obtain the current price for them (*k*).

Thus, only nominal damages can be obtained where the contract price is equal to or less than the market price (*l*). But the above rule is not invariable, and is rather a matter of presumption than of final declaration. Special circumstances duly brought to the defendant's notice may nullify any such presumption (*m*).

In cases where the presumption does not arise the vendor may, subject to the rules as to remoteness of damage, recover the actual amount of his loss (*n*).

Where there is no market.

Furthermore, where there is no market for the goods, the vendor is entitled to recover the full amount of damage actually sustained (*n*), or in other words such an amount as would place him in the same position as if delivery had been duly accepted (*o*).

Date for ascertainment of damage.

The Sale of Goods Act, 1893, s. 50, indicates that, in case of non-acceptance of goods by the buyer, the time at which the

(*h*) Cf. *Maclean v. Dunn*, (1828) 4 Bing. 722.

(*i*) Cf. *Laird v. Pim*, (1841) 7 M. & W. 474, *per* Parke, B., at p. 478; *Boswell v. Kilborn*, (1862) 15 Moo. P. C. 309.

(*k*) Cf. *Barrow v. Arnaud*, (1846) 8 Q. B. 604, *per* Tindal, C.J., at pp. 609 and 610; *Valpy v. Oakley*, (1851) 16 Q. B. 941; *Griffiths v. Perry*, (1859) 1 E. & E. 680. *Vide* Sale of Goods Act, 1893, s. 50.

(*l*) *Valpy v. Oakley*, *ubi supra*.

(*m*) *Vide* Sale of Goods Act, 1893, s. 54; cf. *Hadley v. Baxendale*, (1854) 15 x. 341.

(*n*) *Dunkirk Colliery Co. v. Lever*, (1879) 41 L. T. 633.

(*o*) *Cort v. Ambergate Ry. Co.*, (1851) 17 Q. B. 127.

damages should be measured is the time expressly or by implication appointed for delivery (*p*).

But it is important to note that the date of the breach of contract may precede the date fixed for its completion (*q*).

Where one party to the contract unequivocally repudiates it, prior to the date fixed for its performance, the other party may, if he choose, at once bring an action for damages for the breach of contract (*r*). In such action, the measure of damages is that amount which will cover the injury arising from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which might have afforded means whereby the loss could have been mitigated prior to the date fixed for the completion of the contract (*s*).

Breach of contract prior to date fixed for completion.

In other words, where one party to the contract sues upon an "anticipatory" breach committed by the other party, the contract will be regarded by the court as rescinded for the purpose of suing upon it and as subsisting for the purpose of calculating the damages—the vendor being under an obligation to take all reasonable steps to diminish his loss (*s*). But, to constitute an anticipatory breach, the buyer's repudiation of the contract must be clear and unequivocal (*t*), and be so regarded by the vendor (*u*).

"Repudiation" may consist of an absolute refusal to perform (*x*) the contract, or of an incapacitation of oneself from performing it (*y*).

"Repudiation" must be distinguished from mere assertion of inability to perform (*z*), which does not constitute even a potential breach of contract.

The vendor is, of course, entitled, in spite of a breach by the vendee, to hold the contract open and to keep the vendee to his bargain, but if he decides to keep the contract open, he does so for the benefit of both parties (*a*).

(*p*) Cf. *Boorman v. Nash*, (1829) 9 B. & C. 145; *vide infra*, p. 87; *Brown v. Muller*, (1872) L. R. 7 Ex. 319; *Phillpotts v. Evans*, (1839) 5 M. & W. 475.

(*q*) Cf. *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543.

(*r*) *Frost v. Knight*, (1872) L. R. 7 Ex. 111, *per Cockburn, C.J.*, at p. 113; *Bank of China v. Amer. Trading Co.*, [1894] A. C. 266; cf. *Hochster v. De La Tour*, (1853) 2 E. & B. 678.

(*s*) Cf. *Frost v. Knight*, *ubi supra*, at pp. 114 and 115; *Dunkirk Colliery Co. v. Lever*, (1879) 41 L. T. 633; *Nickoll and Knight v. Ashton*, [1901] 2 K. B. 128, *per Vaughan Williams, L.J.*, at p. 138; *Roth & Co. v. Taysen*, (1896) 1 Com. Cas. 306; *vide supra*, p. 82.

(*t*) *Ripley v. McClure*, (1849) 4 Ex. 345; cf. *Avery v. Bowden*, (1855), 5 E. & B. 714; *Reid v. Hoskins*, (1855) 5 E. & B. 729; *Gueret v. Audouy*, (1893) 62 L. J. Q. B. 633; *Leeson v. North British Oil Co.*, (1874) 8 Ir. Rep. C. L. 309.

(*u*) *Avery v. Bowden*, (1856) 6 E. & B. 953; *Johnstone v. Milling*, (1886) 16 Q. B. D. 460.

(*x*) *Danube Co. v. Xenos*, (1862) 13 C. B. N. S. 825; cf. *Dominion Coal Co. v. Dominion Iron and Steel Co., etc.*, [1909] A. C. 293.

(*y*) *Inchbald v. West Neilgherry Coffee Co.*, (1864) 17 C. B. N. S. 733; *Caines v. Smith*, (1846) 15 M. & W. 189.

(*z*) *Barrick v. Buba*, (1857) 2 C. B. N. S. 563.

(*a*) *Avery v. Bowden*, (1856) 6 E. & B. 953; *Johnstone v. Milling*, (1886) 16 Q. B. D. 460.

If the vendor, at the buyer's request, has delayed delivery, and the buyer subsequently refuse to accept the goods, the vendor is entitled to have the damages assessed with reference to the market price of the goods within a reasonable time after the request to withhold delivery (*b*).

Charge for custody of goods.

When the vendor of goods has intimated to the buyer that he wishes the latter to take delivery, in accordance with the contract, he may, upon the buyer's refusal or neglect, charge a reasonable sum for the care and custody of the goods and any loss occasioned by the buyer's default (*c*).

The vendor, however, in such cases is not entitled to sell the goods (*d*). Furthermore, the above provision as to a charge for custody in no way affects the vendor's rights in cases where the buyer's conduct amounts to a repudiation of the contract (*e*).

Damages recoverable by Vendee against Vendor for Non-Delivery and for Delay in Delivery.

Measure of damages.

The measure of damages recoverable by a vendee in case of failure on the part of a vendor to deliver goods is the estimated loss directly and naturally resulting from the seller's breach of contract (*f*). Ordinarily this is the same as in the case of failure on the part of a vendee to accept goods—to wit, the difference between the contract price and the market price of the goods at the date when they ought to have been delivered (*g*).

Where no available market for goods exists.

Where, however, there is no available market for the goods (*h*), the vendee, in order to prove the value of the goods at the date fixed for delivery, may give evidence of a contract of sub-sale into which he may have entered, though the vendor had no notice of the sub-contract (*i*). The vendee, in such cases, cannot directly claim the loss—if any—of profit as special damage in the strict sense, of consequential damage, though the court may award him an equivalent sum (*j*).

Loss of profits on intended re-sale.

Purchase by vendee of substituted goods to diminish loss.

In the absence of a market for the particular class of goods which the vendor has failed to deliver, the vendee, in order to avert greater loss, may purchase goods in substitution, which are

(*b*) *Hickman v. Haynes*, (1875) L. R. 10 C. P. 598; cf. *Jones v. Gibbons* (1853) 8 Exch. 920, at p. 922.

(*c*) Cf. Sale of Goods Act, 1893, s. 37.

(*d*) *Greaves v. Ashlin*, (1813) 3 Camp. 425; cf. *Bloxam v. Sanders*, (1825) 4 B. & C. 941, at p. 950.

(*e*) Cf. *Mersey Steel Co. v. Naylor & Co.*, (1884) 9 App. Cas. 434, at p. 443.

(*f*) Sale of Goods Act, 1893, s. 51; *Grébert-Borgnis v. Nugent*, (1885) 15 Q. B. D. 85; cf. *Hammond v. Bussey*, (1887) 20 Q. B. D. 79, at p. 93.

(*g*) Cf. Sale of Goods Act, 1893, ss. 50 and 51; *vide supra*, p. 82; *Josling v. Irvine*, (1861) 6 H. & N. 512; cf. *Brady v. Oastler*, (1864) 3 H. & C. 112.

(*h*) As to what constitutes "a market," *vide Dunkirk Colliery v. Lever*, (1878) 9 Ch. D. 20, *per James, L.J.*, at p. 25.

(*i*) *Stroud v. Austin*, (1883) Cab. & El. 119; cf. *France v. Gaudet*, (1871) L. R. 6 Q. B. 199.

(*j*) Cf. *Waters v. Towers*, (1853) 8 Exch. 401, *per Alderson, B.*, at p. 403; *Watson v. Gray*, (1900) 16 T. L. R. 308.

the nearest thereto in price and quality, and may recover the additional expense—if any—thereby incurred (*k*). If no extra expense be incurred, or if, on balance, the plaintiff is no worse off, only nominal damages can be obtained for the breach of contract (*l*).

If the vendee cannot obtain goods in substitution of those which the vendor has failed to deliver, that is to say, if the goods are not marketable, the vendee may recover as damages the loss of profit which he has incurred (*m*), though he cannot claim such loss of profits as strictly consequential damages if the vendor was not notified with regard to them, *vide supra*, p. 84.

Loss of profits.

In such a case, however, the vendee cannot recover from the defaulting vendor the amount which a third party may have recovered against him, the vendee, for failure to perform a sub-contract (*n*).

Damages incurred by vendee to a third party.

The last-mentioned damages would be too remote, except where the vendor had sufficient notice of and accepted the vendee's obligations (*o*).

Where the goods are intended for the vendee's own use, loss of special profits cannot be recovered, unless the vendor expressly accepted such liability (*p*). The vendor will be liable, in such a case, for such damages as he can reasonably be deemed to have contemplated would result from the breach of contract (*q*).

Goods intended for vendee's own use.

Loss of special profits.

It is to be observed that section 51 of the Sale of Goods Act, 1893, which governs the rules of law set out in the immediately preceding paragraphs, does not expressly refer to consequential damages.

Special damages in the strict sense of consequential damages may be recovered by a vendee in any case where the appropriate conditions obtain, *e.g.*, notice of a special sub-contract duly brought to the notice of the vendor (*r*). Special damages accruing to the vendee through inability to perform a sub-contract, consequent upon the vendor's failure to deliver, cannot,

Special or consequential damages.

(*k*) *Hinde v. Liddell*, (1875) L. R. 10 Q. B. 265; cf. *Erie County Natural Gas Co. v. Carroll*, [1911] A. C. 105, at p. 117.

(*l*) *Erie County Natural Gas and Fuel Co. v. Carroll*, *ubi supra*; cf. *British Westinghouse Electric Co. v. Underground Electric Ry. Co. of London*, [1912] W. N. 212.

(*m*) *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445; *McNeill v. Richards*, [1899] 1 Ir. Rep. 79.

(*n*) *Borries v. Hutchinson*, *ubi supra*.

(*o*) *Griebert-Borgnis v. Nugent*, (1885) 15 Q. B. D. 85; *Elbinger Co. v. Armstrong*, (1874) L. R. 9 Q. B. 473. *Vide infra*, pp. 85, 86.

(*p*) *British Columbia Sawmill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499; Cf. *Waters v. Towers* (1853) 8 Exch. 401.

(*q*) *Cory v. Thames Ironworks Co.*, (1868) L. R. 3 Q. B. 181; cf. *De Mattos v. G. E. Steamship Co.* (1885) Cab. & El. 489. This latter case is of doubtful authority.

(*r*) Cf. Sale of Goods Act, 1893, s. 54; *vide supra*, p. 82. Cf. *Horne v. Midland Ry. Co.*, (1872) L. R. 7 C. P. 583; affirmed L. R. 8 C. P. 131; *Smeed v. Foord*, (1859) 28 L. J. Q. B. 178; *Cory v. Thames Ironworks Co.*, (1868) L. R. 3 Q. B. 181; *vide supra*, p. 12.

Vendee's duty to diminish loss.

as a rule, be recovered by the vendee, where the goods are marketable. In such cases, the vendee's plain duty is to minimise his loss by purchasing similar goods in the open market (s).

On the other hand, even in the case of a sale of marketable goods which it is agreed shall be delivered on a future date, the vendee is under no obligation to attempt to minimise apprehended future loss, so long as the contract is kept open.

Date at which loss is to be estimated.

The date at which the loss consequent upon the vendor's failure to deliver is to be calculated is the last date permitted for the completion of the contract (t).

If the vendor before such date commit an "anticipatory breach" of contract, the vendee may or may not treat the contract as being broken (u).

The vendee will only be under a duty, prior to the date originally fixed for the completion of the contract, to minimise his loss, provided that he treat the contract as broken upon its repudiation by the vendor (x).

Postponement of delivery.

Where a vendor and vendee, after entering into a contract of sale, subsequently agree to a postponement of the date of delivery, the date at which the damages in case of failure on the part of the vendor to deliver are to be calculated is, of course, the last day permitted for delivery by the postponing agreement (y).

Agreement to postpone delivery need not be in writing.

It is to be noted that such a postponing agreement does not constitute a fresh contract requiring the observance of the Statute of Frauds (z).

Delivery by instalments.

In the case of a contract for the delivery of goods by instalments, a vendee can recover, from a vendor who repudiates the contract, not only damages for the loss of the contract, but also damages, if any, incurred by the vendee prior to the date of the vendor's repudiation (a). Thus, if the deliveries actually made prior to the date of repudiation were not of proper quality, a special claim in respect of such deliveries can be maintained as well as a claim for loss in respect of instalments which should have been made subsequently to the date of repudiation (a).

(s) Cf. *Barrow v. Arnaud*, (1846) 8 Q. B. 595, per Tindal, C.J., at p. 609.

(t) *Leigh v. Paterson*, (1818) 8 Taunt. 540; cf. *Philpotts v. Evans*, (1839) 5 M. & W. 476; as to instalment deliveries, cf. *Josling v. Irvine*, (1861) 6 H. & N. 512; *Bergheim v. Blaenavon Iron Co.*, (1875) L. R. 10 Q. B. 319.

(u) *Ashmore v. Cox*, [1899] 1 Q. B. 436, per Lord Russell, C.J., at p. 443. *Vide supra*, p. 83.

(x) *Leigh v. Paterson*, *ubi supra*, per Dallas, C.J., at p. 541.

(y) *Ogle v. Vane (Earl)*, (1867) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; *Ashmore v. Cox*, *ubi supra*. As to postponement in case of delivery by instalments, cf. *Tyers v. Rosedale and Ferryhill Iron Co.*, (1873) L. R. 8 Ex. 305; (1875) L. R. 10 Ex. 195.

(z) *Ogle v. Vane (Earl)*, *ubi supra*.

(a) *Dominion Coal Co. v. Dominion Iron and Steel Co., etc.*, [1909] A. C. 293. As to whether a breach in respect of one instalment constitutes a breach of the entire contract, cf. *Honck v. Muller*, (1881) 7 Q. B. D. 92; *Mersey Steel Co. v. Naylor*, (1882) 9 Q. B. D. 648; (1884) 9 App. Cas. 434.

Where no date is specified for delivery in the contract of sale, the vendor is bound to deliver and the vendee is bound to accept delivery, within a reasonable time (*b*) after being called upon by the vendee or vendor to deliver or to accept delivery as the case may be (*c*). Where no date for delivery is specified.

A frequent instance of such a contract which is silent with regard to the time of performance is a contract by the terms of which delivery is to be made "as required" (*d*).

In the case of breach of such a contract the damages would therefore be calculated at such date as had been fixed for its performance in accordance with the above rule—in other words, at the time of the refusal of a reasonable request to deliver or accept (*e*).

The subjects of agreed postponement of delivery, and of delivery in cases of contracts of sale which are silent as to the time of delivery, have just been dealt with (*f*).

It only remains, therefore, to say that in cases where a vendor breaks his contract by delivering goods after the stipulated time, the measure of damages recoverable by the vendee is the difference between the value of the goods when actually delivered and the value which they would have had if delivered at the proper time (*g*). If the purchaser upon the date of late delivery manages to sell the goods above the market price at that date, he must credit the defendant with such excess in estimating the loss sustained (*g*). Delay in delivery.
Measure of damages.

An action for damages for delay in delivery is substantially one for breach of warranty with regard to time. But, in most mercantile contracts, if delay occurs, the vendee is entitled, if he choose, to treat the contract as broken, and to refuse to give a subsequent acceptance (*h*).

The same principles with regard to remoteness of damage which have been set out above apply equally to non-delivery and to delay in delivery (*i*). Thus, where the vendor delays delivery of a chattel intended by the vendee for use in his own business, the loss of its value to the vendee may be estimated and recovered upon the basis of the profits which might have been earned by the chattel during the period in which it was withheld (*k*). But such damages would not be recoverable unless Loss of profits.

(*b*) Sale of Goods Act, 1893, s. 29, sub-s. 2; cf. *Ellis v. Thompson*, (1838) 3 M. & W. 445, *per* Alderson, B., at p. 456.

(*c*) *Jones v. Gibbons*, (1853) 8 Exch. 920, *per* Pollock, C.B., at p. 922.

(*d*) *Jones v. Gibbons*, *ubi supra*.

(*e*) *Vide* Sale of Goods Act, 1893, s. 50 and s. 51; cf. *Shaw v. Holland*, (1846) 15 M. & W. 136, at p. 146; *Greaves v. Ashlin*, (1813) 3 Camp. 426.

(*f*) *Vide supra*, pp. 86, 87.

(*g*) *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301.

(*h*) *Reuter v. Sala*, (1879) 4 C. P. D. 239, *per* Cotton, L.J., at p. 249.

(*i*) *Vide supra*, pp. 84, 85.

(*k*) *Fletcher v. Tayleur*, (1855) 17 C. B. 21; cf. *Waters v. Towers*, (1853) 8 Exch. 401, at p. 403.

the vendor could be held to have had due notice of the purpose for which the chattel was required (*l*), and to have accepted the obligation (*m*).

Specific performance.

In any action for breach of contract to deliver specific goods, the court may direct that the defendant, instead of paying damages, must specifically perform the contract (*n*).

Where price is paid prior to delivery.

When goods are paid for prior to the date fixed for delivery, and the vendor fails to deliver them, the measure of damages is *primâ facie* the value of the goods at the date of the trial (*o*).

It is difficult to completely reconcile all the decisions which have been given upon this point, but it is submitted that the above is a correct statement of the law (*p*).

Payment by dishonoured bill of exchange is nugatory.

When payment for the goods is made by a bill of exchange which is dishonoured before action is brought for non-delivery, the case rests upon the same footing as if no payment had been made (*q*).

Breach of Warranty.

Warranty of Title.

Implied condition as to vendor's title.

In a contract of sale there is, ordinarily, an implied condition that the vendor has the right to sell the goods, and an implied warranty that the vendee shall have quiet possession of the goods, and that the goods shall be free from any charge in favour of any third party (*r*).

Measure of damages.

It would therefore seem to be now established that in a case of breach of warranty of title the vendee may not merely recover the price, if paid, as on a failure of consideration, but may claim unliquidated damages (*s*). The measure of such damages would be governed by the ordinary principles with regard to remoteness of damage (*t*), and would be quite different from the measure of damages recoverable in a case of a sale of land (*u*).

(*l*) Cf. *Hadley v. Baxendale*, (1854) 9 Ex. 341; *Watson v. Gray*, (1900) 16 T. L. R. 308.

(*m*) Cf. *British Columbia Sawmill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499; *Smeed v. Foord*, (1859) 1 E. & E. 602; cf., however, *Waters v. Towers*, *ubi supra*, at p. 403.

(*n*) Sale of Goods Act, 1893, s. 52.

(*o*) *Elliott v. Hughes*, (1863) 3 F. & F. 387. It is to be noted that the head-note to the report is incorrect. In that case the value had continuously risen up to the date of trial. Cf. *Harrison v. Harrison*, (1834) 1 C. & P. 412; *Owen v. Routh*, (1854) 14 C. B. 327, at p. 340; *Robertson v. Dumaresq*, (1864) 10 L. T. 110, P. C., at p. 111; *vide* Earl of Halsbury's Laws of England, Vol. X., at p. 334.

(*p*) Cf. *per contra Startup v. Cortazzi*, (1835) 2 C. M. & R. 165.

(*q*) *Valpy v. Oakeley*, (1851) 16 Q. B. 941, *per* Patteson, J., at p. 950; cf. *Griffiths v. Perry*, (1859) 1 E. & E. 680.

(*r*) Sale of Goods Act, 1893, s. 12; cf. *Eichholz v. Bannister*, (1864) 34 L. J. C. P. 105; *Sims v. Marryat*, (1851) 17 Q. B. 281, at p. 291; *Morley v. Attenborough*, (1849) 3 Exch. 500.

(*s*) Sale of Goods Act, 1893, s. 53; *vide* Chalmers' Sale of Goods (6th ed.), at p. 31.

(*t*) *Vide supra*, Chap. 2, s. 1; Sale of Goods Act, 1893, s. 53.

(*u*) Cf. *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158, *per* Lord Chelmsford, at p. 207.

It may be observed that no restrictive covenants or conditions may be imposed in a contract for the sale of goods so as to bind subsequent purchasers, even though the conditions are brought to the notice of the subsequent purchasers at the time of the sale to them (*x*).

Restrictive covenants inapplicable to goods.

Warranty of Quality.

Warranties may arise under various circumstances. In a contract for the sale of goods there may or may not be an express warranty of quality.

Where a contract of sale is subject to any condition, the vendee may elect to treat the breach of such condition as a breach of warranty (*y*).

Condition may be treated as a warranty.

There is an implied warranty that goods sold are reasonably fit (*z*) for the purpose for which they are obviously intended to be used (*a*).

Implied warranties.

An implied warranty may be annexed by the usage of trade (*a*).

In the case of breach of warranty of quality, the measure of damages is the estimated loss directly and naturally resulting (*b*). Such loss is *primâ facie* the difference between the actual value of the goods at the time of delivery to the vendee and the value they would have had if they had answered to the warranty (*c*).

Measure of damages.

It is to be observed that, in estimating the loss sustained by a breach of warranty, the difference between the value of the goods without defect and their actual value is the criterion laid down by the Sale of Goods Act, and not the difference between the contract price and their actual value (*d*).

Where the goods have been resold by the vendee, prior to the discovery of the breach of warranty, the price of resale may be adduced as evidence of the real value of the goods without their defect (*e*).

Where goods are sold with a warranty attached foreshadowing their use for a particular purpose, damages may be recovered in

(*x*) *McGruther v. Pitcher*, [1904] 2 Ch. 306.

(*y*) Sale of Goods Act, 1893, s. 11.

(*z*) For interpretation of "reasonably fit," *vide Strongitharm v. North Lonsdale Iron and Steel Co., Ltd.*, (1905) 21 T. L. R. 257.

(*a*) Sale of Goods Act, 1893, s. 14.

(*b*) *Randall v. Raper*, (1858) 27 L. J. Q. B. 266; *Randall v. Newson*, (1877) 2 Q. B. D. 102; *Holden v. Bostock & Co.*, (1902) 18 T. L. R. 317; *Clark v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608; *Jackson v. Watson & Sons*, [1909] 2 K. B. 193; cf. *Ward v. Hobbs*, (1878) 4 App. Cas. 13.

(*c*) Sale of Goods Act, 1893, s. 53; *Jones v. Just*, (1868) L. R. 3 Q. B. 197; cf. *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438, *per* Bovill, C.J., at p. 453; *Ashworth v. Wells*, (1898) 78 L. T. 136.

(*d*) Cf. *Curtis v. Hannay*, (1800) 3 Esp. 82, *per* Lord Eldon, C.J., at p. 84; *Ashworth v. Wells*, *ubi supra*.

(*e*) *Clare v. Maynard*, (1837) 6 Ad. & El. 519, 523, n.

respect of consequential loss sustained through failure of that purpose (*f*).

But such loss must not be too remote nor beyond contemplation at the date of the formation of the contract (*g*).

Duty of
vendee to
minimise loss.

The vendee is in such cases under a duty to minimise the loss as far as he reasonably can, and he may recover expenses reasonably incurred in doing so (*h*). But if such expenses, when laid out, prove more beneficial to the vendee than the due performance of the contract by the vendor would have done, the loss and gain must be balanced one against the other (*i*). One obvious method of minimising the loss is to buy other goods in substitution (*i*).

In a recent case it was held that, in an action for breach of a warranty to the effect that tinned salmon sold to the plaintiff was fit for human consumption, the plaintiff, whose wife had died in consequence of eating the salmon, could recover damages for loss of his wife's services in the household.

The plaintiff also recovered damages for medical and funeral expenses incurred on his wife's behalf (*k*).

Goods
intended for
re-sale.

Where goods commonly intended for resale are sold with a warranty, any damages which the vendee has become liable to pay to his sub-purchasers through breach of his corresponding warranty to them may be recovered from the original vendor (*l*).

In addition the vendee may recover the costs incurred in defending the action brought by his sub-purchaser, provided such costs be reasonably incurred (*m*). The costs of an appeal cannot be recovered (*n*).

The warranty, however, must be identical. If the vendee convert the goods into some new substance the former warranty does not necessarily obtain (*o*). Damages for loss of business reputation caused by the resale cannot ordinarily be recovered (*p*).

(*f*) *Bridge v. Waine*, (1816) 1 Stark. 504, *per* Lord Ellenborough, at p. 506; *Mowbray v. Merryweather*, [1895] 2 Q. B. 640; *Smith v. Johnson*, (1899) 15 T. L. R. 179; *Vogan & Co. v. Oulton*, (1899) 81 L. T. 435; *Scott v. Foley*, (1899) 16 T. L. R. 55; *Molling v. Dean*, (1902) 18 T. L. R. 216.

(*g*) *Fitzgerald v. Leonard*, (1893) 32 L. R. Ir. 675; *cf. British Columbia Sawmill Co. v. Nettleship*, (1868) L. R. 3 C. P. 499; *Cory v. Thames Ironworks Co.*, (1868) L. R. 3 Q. B. 181. *Vide supra*, p. 11 *seqq.*

(*h*) *Vide supra*, p. 13, 84, 85.

(*i*) *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] W. N. 212; *cf. Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105.

(*k*) *Jackson v. Watson & Sons*, [1909] 2 K. B. 193.

(*l*) *Randall v. Raper*, (1858) E. B. & E. 84; *Hammond v. Bussey*, (1887) 20 Q. B. D. 79.

(*m*) *Lewis v. Peake*, (1816) 7 Taunt. 153; *Hammond v. Bussey, ubi supra*; *Vogan & Co. v. Oulton*, (1899) 81 L. T. 435; *cf. Wrightup v. Chamberlain*, (1839) 7 Scott, 598; *Assicurazione Generali de Trieste v. Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 815, *per* Pickford, J., at p. 821. *Vide infra*, pp. 307, 308.

(*n*) *Vogan & Co. v. Oulton, ubi supra*; *Shepherd v. Bray*, [1906] 2 Ch. 235, 254.

(*o*) *Bostock & Co. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725.

(*p*) *Bostock & Co. v. Nicholson & Sons, Ltd., ubi supra*; *cf. Fitzgerald v. Leonard*, (1893) 32 L. R. Ir. 675; *Watson v. Gray*, (1900) 16 T. L. R. 308.

A commission agent who consigns goods to his principal is in a different position to an ordinary vendor. If the goods which he sends do not correspond with their description, the measure of damages is the loss directly sustained by the principal—not the difference in value between the goods ordered and those delivered (*q*).

Commission agent distinguished from vendor.

The measure of damages recoverable for breach of warranty of quality may be greatly modified by reason of the goods having been returned.

If the price has been paid, but no special damage has been suffered, the vendee, upon returning the goods to the vendor, is only entitled to recover the purchase-money (*r*).

Where goods have been returned to vendor.

A vendee of goods under an executory contract, that is to say, of goods which are not ascertained or are not in existence at the date of the formation of the contract, is entitled to return them on the ground of breach of warranty, provided he has “never completely accepted” them (*s*).

Right of vendee to reject or return goods.

But if specific goods have been sold with a warranty, the vendee cannot refuse to receive them (*t*), nor can he return them after receipt (*u*), unless the contract so provides (*x*).

If the vendee properly rejects (*y*) goods tendered, and the vendor refuse to take them back, the vendee may recover the expenses of keep incurred after such rejection, for such a reasonable time as is necessary for him to keep them, in order to sell them to the best advantage (*y*).

Costs of keeping rejected goods.

It may be observed that where goods are sold with a warranty which is broken, it is a matter of comparative unimportance to the vendee whether the warranty be fraudulent or not, since the question of fraud in no way affects the degree of remoteness of loss in respect of which damages may be claimed (*z*).

Remoteness of damage unaffected by fraud where a warranty exists.

On the other hand, in the case of goods sold upon representations which do not amount to warranties, the vendee's claim to damages can only rest upon an allegation of fraud (*a*), except in

Otherwise where no warranty exists.

(*q*) *Cassaboglou v. Gibbs*, (1883) 11 Q. B. D. 797; *Salvesen v. Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

(*r*) *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438; *Caswell v. Coare*, (1809) 1 Taunt. 566.

(*s*) *Street v. Blay*, (1831) 2 B. & Ad. 456, *per* Lord Tenterden, at p. 463; *cf. Bannerman v. White*, (1861) 31 L. J. C. P. 28, *per* Erle, J., at p. 32; *Wells v. Hopkins*, (1839) 5 M. & W. 7. The vendee need only intimate to the vendor his refusal to accept—he is not bound to return the goods. *Vide* Sale of Goods Act, 1893, s. 36; *Grimoldby v. Wells*, (1875) L. R. 10 C. P. 391. As to place of rejection, *vide* *Heilbutt v. Hickson*, *ubi supra*, at p. 456.

(*t*) *Dawson v. Collis*, (1851) 10 C. B. 523.

(*u*) *Gompertz v. Denton*, (1832) 1 C. & M. 207; *Street v. Blay*, *ubi supra*.

(*x*) *Head v. Tattersall*, (1871) L. R. 7 Ex. 7.

(*y*) *Caswell v. Coare*, *ubi supra*, and 2 Camp. 82; *Chesterman v. Lamb*, (1834) 2 A. & E. 129; *Ellis v. Chinnock*, (1835) 7 C. & P. 169.

(*z*) *Mullett v. Mason*, (1865) L. R. 1 C. P. 559; *cf. Smith v. Green*, (1875) 1 C. P. D. 92.

(*a*) *Langridge v. Levy*, (1838) 4 M. & W. 337. In this case the vendee's son was the plaintiff and he was therefore unable to sue for breach of warranty, since he was not a party to the contract.

exceptional cases where an action for negligence might lie (*b*). Apart from negligence, if there be neither fraud nor a breach of warranty, no action can lie for loss incurred by the vendee consequent upon a sale of goods (*c*).

Rescission.

Therefore the court will not even grant rescission of an executed contract for the sale of goods, if the misrepresentation has been of an innocent character (*d*).

Alternative remedies of vendee.

Where there is a breach of warranty by the vendor, the vendee may either bring an action for damages or set up against the vendor the breach of warranty in diminution or extinction of the price (*e*).

The whole loss incurred by the vendee need not therefore be pleaded as a counterclaim and made the subject of a cross-action. It may be pleaded in defence to the claim for price, subject to what is said below.

If the vendee, in defence to an action for the price, sets up the breach of warranty in diminution thereof, he is not precluded from claiming in a further action damages accruing subsequently (*f*). In fact, the vendee, if sued for the price, may, if he choose, pay in full, and sue later for breach of contract (*g*).

Distinction between claim for diminution in price and claim for consequential damage.

It is to be observed that the vendee cannot set up, in diminution of the price, matters which ought properly to form the subject of a cross-action (*h*). He can only plead, in diminution, matters showing how much less valuable the goods delivered actually were than they should have been (*h*).

SECTION II.

Stocks and Shares, including Contracts for the Sale thereof.

	PAGE
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Stocks and shares come within the designation of personal property, and the principles relating to their purchase and sale correspond in the main with those relating to the purchase and the sale of ordinary goods and chattels; but, since stocks and

(*b*) *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155.

(*c*) Cf. *Ward v. Hobbs*, (1878) 4 App. Cas. 13; *Hills v. Balls*, (1857) 2 H. & N. 299.

(*d*) *Seddon v. N. E. Salt Co., Ltd.*, [1905] 1 Ch. 326.

(*e*) Sale of Goods Act, 1893, s. 53; cf. as to reduction, *Street v. Blay*, (1831) 2 B. & Ad. 456; as to extinction, *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

(*f*) *Mondel v. Steel*, (1841) 8 M. & W. 858, *per* Parke, B., at p. 872.

(*g*) *Davis v. Hedges*, (1871) L. R. 6 Q. B. 687.

(*h*) *Mondel v. Steel*, *ubi supra*, at p. 872; *Francis v. Baker*, (1839) 10 A. & E. 642.

shares constitute a specialised form of personal property with certain peculiar proprietary incidents attaching thereto, it is desirable to consider the law of damages with regard to them in a special section exclusively devoted to that particular subject.

Company's Liability upon Estoppel in respect of Issued Certificate.

When a person buys shares in a company of limited liability he receives, in the ordinary course, a certificate from the company certifying that he is the registered holder of the shares specified in the certificate.

A certificate, though inaccurate, estops the company from denying its accuracy against any person relying on it, including (unless it is based on a forged transfer lodged by him) the person to whom it is issued (*i*), and that person, if "put to rest" by the certificate, so as to lose his remedy against his broker or transferor, is entitled to damages against the company (*k*).

Company estopped from denying accuracy of its certificate.

If, at the date of the issuing of the certificate, the plaintiff had no effective remedy against his broker or transferor, *e.g.*, if the latter were a man of straw, the measure of damages recoverable against the company would be nil (*k*).

If a plaintiff purchase shares from a third party, upon the faith of a certificate issued by the company to such third party, the company is estopped from denying the plaintiff's title, although the certificate does not amount to a warranty of title upon which the plaintiff could sue the company at common law (*l*). If the company refuse to register the plaintiff as transferee, the plaintiff may thereupon recover damages, the measure of which is the value of the shares at the date of the refusal to register (*l*), together, possibly, with interest from such date (*m*).

But, certificate is not a warranty of title.

Damages recoverable by transferee.

But, on the other hand, if a certificate is true at the date when it is issued, but subsequently it becomes untrue, no question of estoppel arises, and no damages are apparently recoverable against the company for negligently permitting third parties to make a fraudulent use of it, since the company owes no duty to any one with regard to the certificate, except to the registered holder of the shares (*n*).

Duties of company in regard to certificates.

The measure of damages recoverable against a company by estoppel, in respect of a refusal to register a transferee, is, of

Refusal of company to register a shareholder.

(*i*) *The Balkis Consolidated Co. v. Frederick Tomkinson*, [1893] A. C. 396; *Bloomenthal v. Ford*, [1897] A. C. 156; cf. *Parbury's Case*, [1896] 1 Ch. 100, at p. 107; *Bank of England v. Cutler*, [1907] 1 K. B. 889.

(*k*) *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833; cf. *Knights v. Whiffen*, (1870) L. R. 5 Q. B. 660.

(*l*) *In re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618.

(*m*) *In re Bahia and San Francisco Ry. Co.*, (1868) L. R. 3 Q. B. 584.

(*n*) Cf. *Rainford v. James Keith, Ltd.*, [1905] 1 Ch. 296; [1905] 2 Ch. 147, per Vaughan-Williams, L.J., at p. 160; *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646.

Measure of
damages
recoverable
by transferor.

course, in some cases merely nominal, and a company usually has some slight degree of discretion allowed to it in the matter of registration. But, where the refusal to register is grounded upon a denial of the title of the intending transferor to whom a certificate of proprietorship has previously been issued by the company, the transferor may recover the full damages which he has sustained (*o*). Such damages may comprise the amount of the enhanced value of the market price of the shares which the transferor has had to pay in order to buy substituted shares for delivery to his transferee (*o*).

Non-delivery of Shares or Stock.

Measure of
damages.

If a vendor contracts to sell and deliver shares and fails to perform his contract, the measure of damages recoverable by the vendee is the difference between the contract price and the market price at the date of the breach (*p*), if the latter be greater than the former.

Action
against com-
pany.

Similarly, in an action brought against a company for improperly withholding shares after a tender of the sum due for calls and interest, the measure of damages is the value of the shares at the market price on the day of tender, less the amount due for calls and interest (*q*).

What is
"market
price."

In ascertaining the market price of shares "hammer prices," *i.e.*, prices at which a defaulting broker's shares are compulsorily sold, are to be disregarded (*r*). Actions for damages in cases where the purchase-money has actually been paid would appear to be identical in principle with actions for non-replacement of stock (as to which *vide infra*).

Action
against direc-
tors for
breach of
warranty of
authority.

In an action against directors for breach of an implied warranty of authority to give debenture stock in return for services rendered by the plaintiff, the measure of damages is the value of the stock which the plaintiff ought to have received (*s*).

Action for Non-replacement of Shares or Stock.

Measure of
damages.

Where there has been a loan of shares or stock and the defendant has broken his agreement to replace them, the measure of damages recoverable is the value of the shares lent. If the value has risen since the date fixed for replacement the price

(*o*) *Batlis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, *per* Lord Chancellor, at pp. 407 and 408.

(*p*) *Shaw v. Holland*, (1846) 15 M. & W. 136; *Powell v. Jessop*, (1856) 18 C. B. 336; *cf. Michael v. Hart*, [1902] 1 K. B. 482; (1904) 89 L. T. 422; *Murray v. Hewitt*, (1886) 2 T. L. R. 872.

(*q*) *Van Diemen's Land Co. v. Cockerell*, (1857) 1 C. B. N. S. 732; *cf. Ex parte Appleyard*, (1881) 18 Ch. D. 587.

(*r*) *Anderson v. Beard*, [1900] 2 Q. B. 260.

(*s*) *Firbank's Exors. v. Humphreys*, (1886) 18 Q. B. D. 54, at p. 62.

will be determined as at the date of trial (*t*). If the value has fallen, it would appear that the price will be determined as at the date when the shares should have been replaced (*u*), or if no date had been fixed, then as at the date of transfer to the borrower, *i.e.*, the date of the loan (*v*).

Thus, it is intended that the plaintiff shall be at least indemnified (*x*). But he is not able to recover the value of the shares estimated upon the basis of the highest price which they may have reached between the date of the loan and the date of trial (*y*). On the other hand, there are decisions to the effect that, in a case of conversion of shares or stock, the plaintiff may recover their value based upon the highest price which has been reached between the date of conversion and the date of trial (*z*).

Wrongful conversion of shares or stock.

Furthermore, in the case of a summons brought by a liquidator of a company against directors for misfeasance in holding qualification shares in trust for and at the will of the promoter, the measure of damages is the highest value at which similar shares were issued by the company or to which they may have risen during the wrongful holding by the directors (*a*).

Wrongful holding of shares.

Non-acceptance of Shares or Stock.

If a purchaser agrees to buy shares and fails to duly accept them, the measure of damages recoverable by the vendor is the difference between the contract price and the market price at the date of the breach (*b*), if the latter be less than the former.

Measure of damages.

The measure of damages for breach of a contract to take debentures in a company is the extent of the loss directly sustained by the company through the breach, and is not the sum agreed to be lent (*c*). Such loss is ordinarily measured by the increased cost—if any—of procuring the sum agreed to be lent,

Contract to take debentures.

(*t*) *Downes v. Back*, (1816) 1 Stark. 318; *Harrison v. Harrison*, (1824) 1 C. & P. 412; *Shepherd v. Johnson*, (1802) 2 East, 211; *Gainsford v. Carroll*, (1824) 2 B. & C. 624, at p. 625; *Owen v. Routh*, (1854) 14 C. B. 327.

(*u*) *Sanders v. Kentish*, (1799) 8 T. R. 162; *cf.*, however, *Owen v. Routh*, *ubi supra*, at p. 340; *cf.* also *Blyth v. Carpenter*, (1866) L. R. 2 Eq. 501.

(*v*) *Forrest v. Elwes*, (1799) 4 Ves. 492; *cf.*, however, *Owen v. Routh*, *ubi supra*, at p. 340.

(*x*) *Shepherd v. Johnson*, *ubi supra*, *per* Grose, J., at p. 212; *cf.* *Vaughan v. Wood*, (1833) 1 Myl. & K. 403.

(*y*) *M'Arthur v. Seaforth (Lord)*, (1810) 2 Taunt. 257; *cf.* *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270, at pp. 284 and 285; *Mansell v. British Linen Co.*, [1892] 3 Ch. 159.

(*z*) *Archer v. Williams*, (1846) 2 C. & K. 26, *per* Cresswell, J., at p. 28; *Johnson v. Hook*, (1883) 1 Cab. & El. 89; *cf.* *Michael v. Hart*, [1902] 1 K. B. 482; *cf.*, however, *Shaw v. Holland*, [1900] 2 Ch. 305.

(*a*) *In re L. & S. W. Canal, Ltd.*, [1911] 1 Ch. 346; *cf.* *Eden v. Ridsdales Railway Lamp Co.*, (1889) 23 Q. B. D. 368; *cf.*, however, *Shaw v. Holland*, *ubi supra*.

(*b*) *Cf.* *Pott v. Flather*, (1847) 16 L. J. Q. B. 366; *Barned v. Hamilton*, (1841) 2 Rail. Cas. 624; *cf.*, however, *Stewart v. Cauty*, (1841) 8 M. & W. 160. As to determination of date of breach, *vide* *Barned v. Hamilton*, *ubi supra*, and *Tempest v. Kilner*, (1845) 2 C. B. 300.

(*c*) *South African Territories v. Wallington*, [1897] 1 Q. B. 692, at pp. 696, 697; affirmed [1898] A. C. 309.

but any special loss incurred may be recovered, if it is not too remote in character (*d*).

If the increased cost to the company of procuring a loan elsewhere is due to circumstances quite unconnected with the defendant's breach of contract, the defendant is not liable therefor (*e*).

SECTION III.

Torts in relation to Personal Property.

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Conversion or Trover.

Conversion defined.

Conversion or trover consists in the taking of a chattel by a tortfeasor for his own use or for the use of another; or, it may consist in the assertion by the tortfeasor of a right over a chattel inconsistent with the true owner's general dominion over it, as, for instance, where the tortfeasor is originally in lawful possession of the chattel and subsequently wrongfully refuses to deliver it up to the owner.

The gist of the action is the defendant's wrongful conversion, and not the mere taking (*f*).

Thus, simple asportation of a chattel, without any intention of making further use of it, will not suffice to maintain an action for conversion, though it may suffice to found an action for trespass (*g*).

On the other hand, destruction of a chattel constitutes an act both of conversion and trespass, since the result is to wholly deprive the owner of its use (*h*).

Conversion is a wrong to the person entitled to immediate possession; trespass is essentially a wrong to the actual possessor. The actual possessor is frequently, but not always, the person

(*d*) See note (*c*), p. 95, *ante*.

(*e*) *Bahamas Sisal Plantation v. Griffin*, (1897) 14 T. L. R. 139.

(*f*) *Cooper v. Chitty*, (1756) 1 W. Bl. 65; 1 Burr. 20; cf. *Henderson v. Williams*, [1895] 1 Q. B. 521.

(*g*) *Fouldes v. Willoughby*, (1841) 8 M. & W. 540, *per* Lord Abinger, at p. 544; cf., however, *Bac. Abr. Trover* (B.).

(*h*) *Fouldes v. Willoughby*, *ubi supra*, *per* Alderson, B., at p. 549; but cf. *Simmons v. Lillystone*, (1853) 8 Exch. 431, at p. 442.

entitled to immediate possession, so that conversion may, but does not necessarily, include trespass.

It is immaterial so far as the basis of the action is concerned whether the defendant was or was not acting under a *bonâ fide* claim of right. A *bonâ fide* claim of right may, however, in certain circumstances, affect the measure of damages (*i*).

Broadly speaking, it may be said that an action for trespass is founded upon possession, while an action for conversion is founded upon property (*j*), though, as mentioned hereafter, a mere bailee of goods may bring an action for conversion (*k*).

Measure of Damages.

In actions for conversion the measure of damages is ordinarily the full value or market price of the chattel or goods converted (*l*).

If the goods have been tendered and received back the damages may be proportionately reduced (*m*), but nominal damages are invariably recoverable for conversion, even though no appreciable loss be sustained (*n*).

If the defendant is able and willing to deliver up the goods in an unimpaired state, the judgment may, if the plaintiff be willing, take the same form as in an action for detinue. Such judgment provides that the damages shall be the value of the goods, but that in case of their return the damages shall be reduced to a nominal sum (*o*). Return of goods.

Such form of judgment would naturally be inapplicable where special damages had been incurred (*p*), or where the goods had been so mutilated that they could not be returned in an intact state (*q*).

It is further to be noted that in cases of conversion where no special damages have been incurred, and the subject-matter consists of a specific chattel of ascertained quantity and quality, the chattel may be brought into court (*r*). If it be so brought in and costs paid, the court may stay further proceedings (*s*). Goods brought into court.

(*i*) *Vide infra*, pp. 98, 99.

(*j*) *Balme v. Hutton*, (1833) 9 Bing. 471, at p. 477.

(*k*) As to cause of action and parties who may sue in conversion, *vide* Addison's Law of Torts (8th ed.), at pp. 570-590.

(*l*) *Reid v. Fairbanks*, (1853) 13 C. B. 692; *Turner v. Hardcastle*, (1862) 11 C. B. N. S. 683, *per* Erle, C.J., at p. 708; *cf. Bavins v. L. & S. W. Bank, Ltd.*, [1900] 1 Q. B. 270.)

(*m*) *Edmondson v. Nuttall*, (1864) 17 C. B. N. S. 280, *per* Willes, J., at p. 294; *cf. Harvey v. Pocock*, (1843) 11 M. & W. 740; *Moon v. Raphael*, (1835) 2 Bing. N. C. 310; *Hiort v. L. & N. W. Ry. Co.*, (1879) 4 Ex. D. 188.

(*n*) *Cf. Bac. Abr. Trover* (B.).

(*o*) *Wintle v. Rudge*, (1841) 5 Jur. 274.

(*p*) *Vide infra*, p. 105.

(*q*) *Cf. McLeod v. M'Ghie*, (1841) 2 M. & G. 326.

(*r*) *Cf. Fisher v. Prince*, (1762) 3 Burr. 1363, *per* Lord Mansfield, at p. 1364.

(*s*) *Fisher v. Prince, ubi supra*; *Pickering v. Truste*, (1796) 7 T. R. 53 (trespass); *Gibson v. Humphrey*, (1833) 1 C. & M. 544; *per contra Makinson v. Rawlinson*, (1821) 9 Price, 460.

Similarly in an action for conversion of several different articles the court may stay further proceedings in respect of such of the articles as are brought into court (*t*).

If the plaintiff, in spite of delivery up of his goods by the defendant, desires to proceed, after the defendant's application to stay proceedings, in order to obtain damages for detention, he may do so "at the peril of costs" (*u*), but the court will not give him leave to proceed for merely nominal damages (*x*).

Damages for detention.

The measure of damages in actions for conversion where the goods have been delivered up but damages are claimed for loss sustained by detention is by analogy identical with that in actions for detinue.

The measure of such damages is the difference between the highest value of the goods during the period of their detention and their value at the date of their delivery to the plaintiff (*y*) or the court.

Date of delivery.

The exact date of delivery of the goods to the plaintiff may be a matter of dispute. Illustrations as to when the date may be determined are to be found in *Peruvian Guano Co. v. Dreyfus*, [1892] A. C. 166, and *Serrao v. Noel*, (1885) 15 Q. B. D. 549.

Date at which value of converted goods is to be estimated.

The time at which the value of the goods converted is to be estimated is generally the date of conversion (*z*), but the court in its discretion may determine and award the value attaching at any subsequent time (*a*). If damages are awarded upon the basis of the value attaching to the goods at a date subsequent to their conversion, the effect is equivalent to awarding damages for conversion plus detention.

Where the value of goods has been enhanced by defendant after conversion.

If, however, a defendant acting under a *bonâ fide* claim of right has proceeded to lay out money upon the goods and has thereby enhanced their value, the plaintiff will not be able to recover such superadded value as damages (*b*).

The distinction between *bona fides* and *mala fides* is important with regard to the damages recoverable (*c*). If the defendant

(*t*) *Earle v. Holderness*, (1828) 4 Bing. 462; *Burnsden v. Austin*, (1794) 1 Tidd. Prac. (9th ed.), 545.

(*u*) *Fisher v. Prince*, (1762) 3 Burr. 1363, *per* Lord Mansfield at p. 1365; *Earle v. Holderness*, *ubi supra*.

(*x*) *Moss v. Thwaite*, (1777) 1 Tidd. Prac. (9th ed.) 545.

(*y*) *Archer v. Williams*, (1846) 2 C. & K. 27, *per* Cresswell, J., at p. 28: *cf. Williams v. Archer*, (1847) 5 C. B. 318, *per* Parke, B., at p. 325. The head-note to *Williams v. Archer* is not quite correct. *Cf. Barrow v. Arnaud*, (1846) 8 Q. B. 595, at p. 609.

(*z*) *Cf. Stowe v. Benstead*, [1909] 2 K. B. 415.

(*a*) *Greening v. Wilkinson*, (1825) 1 C. & P. 625; *Johnson v. Hook*, (1883) 1 Cab. & El. 89; 31 W. R. 812; *Archer v. Williams*, (1846) 2 C. & K. 26, *per* Cresswell, J., at p. 28; *cf. per contra, Mercer v. Jones*, (1813) 3 Camp. 477; *Reid v. Fairbanks*, (1853) 13 C. B. 692, *per* Maule, J., at p. 728.

(*b*) *Reid v. Fairbanks*, *ubi supra*, at p. 729; *cf. Peruvian Guano Co. v. Dreyfus Bros. & Co.*, [1892] A. C. 166, *per* Lord Macnaghten, at pp. 174, 175; *Green v. Farmer*, (1768) 4 Burr. 2214, at p. 2223.

(*c*) *Wild v. Holt*, (1842) 9 M. & W. 672, *per* Parke, B., at p. 673; *cf. Wood v. Morewood*, (1841) 3 Q. B. 440, n.

was a mere wrong-doer, he is not entitled to as great—if any—deduction in respect of his labours (*d*).

The question frequently arises in connection with cases of wrongful removal of minerals (*e*).

In estimating the value of goods which have been converted, the following criteria have been acted upon:—

- (1) The value of the goods at the place where their market exists, with a deduction for their cost of transit to such place (*f*).
- (2) The cost or invoice price of the goods together with the freight paid by the shipper for carriage to the merchant (*g*).
- (3) In the case of goods not procurable in the market, the price at which the true owner had contracted to resell his goods (*h*).

Criteria for estimation of value of converted goods.

In the case of goods which have been made the subject of a sale, but the full price for which has not been paid to the vendor, the vendee in an action for conversion against a mere wrong-doer may recover the full value of the goods (*i*). But in an action against the unpaid vendor, or any one claiming under the vendor, the vendee can only recover the amount of his interest in the goods (*i*).

Difference in measure of damages recoverable against a stranger and against vendor or bailor.

The same principle applies in respect of the measure of damages recoverable by a bailee against a stranger (*k*), as distinguished from a bailor or party claiming under a bailor (*l*). As between a bailee and a stranger, the liability of the bailee to the bailor is immaterial (*i*).

If, however, an unpaid vendor seizes goods which have been actually delivered to the vendee, the vendee may recover in an action for trespass the full value of the goods without any deduction for price (*m*).

Seizure of goods by unpaid vendor.

While it is true that a mere bailee of goods, or a holder of goods under a lien, is entitled in an action for conversion against

Action by tenant in common or joint tenant.

(*d*) *Martin v. Porter*, (1839) 5 M. & W. 352; cf. *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405.

(*e*) *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25; *Att.-Gen. v. Tomline*, (1877) 5 Ch. D. 750; *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 350. Vide Chapter III., Trespass to Real Property, *supra*.

(*f*) *Burmah Trading Co., Ltd. v. Mirza Sherazee and the Burmah Co., Ltd.*, (1878) L. R. 5 Ind. App. 130; cf. *Morgan v. Powell*, (1842) 3 Q. B. 278.

(*g*) *Ewbank v. Nutting*, (1849) 7 C. B. 797, *per* Cresswell, J., at p. 811.

(*h*) *France v. Gaudet*, (1871) L. R. 6 Q. B. 199.

(*i*) *Turner v. Harcastle*, (1862) 11 C. B. N. S. 683, *per* Erle, C.J., at pp. 708, 709; *Chinery v. Viall*, (1860) 5 H. & N. 288.

(*k*) *Jeffries v. G. W. Ry. Co.*, (1856) 5 E. & B. 802; *The Winkfield*, [1902] P. 42; cf. *Glenwood Lumber Co., Ltd. v. Phillips*, [1904] A. C. 405.

(*l*) *Brierly v. Kendall*, (1852) 17 Q. B. 937; cf. *Toms v. Wilson*, (1863) 4 B. & S. 455, *per* Pollock, C.B., at pp. 458, 459; *Johnson v. Stear*, (1863) 15 C. B. N. S. 330. *Johnson v. Stear* is really a case of damages for improper sale, since the plaintiff had not sufficient property in the chattel to maintain an action for trover (*vide* *Donald v. Suckling*, (1866) L. R. 1 Q. B. 585, *per* Blackburn, J., at p. 617, and Addison on Torts (8th ed.), at p. 578).

(*m*) *Gillard v. Brittan*, (1841) 8 M. & W. 575.

a stranger to recover the full value of the goods, nevertheless the measure of damages in an action brought by one of several tenants in common or joint tenants of a chattel is only the extent and value of his interest (*n*). The fact that a plaintiff has only got a part share in the chattels should be specially pleaded by the defendant (*o*).

Defect in

Similarly, a defect in the plaintiff's title, if specially pleaded, may serve to reduce the damages (*p*).

Pledgor and
Pledgee.

A pledgor of goods cannot bring an action for conversion against his pledgee, or a party claiming under the pledgee, until he has paid or tendered the debt due to his pledgee (*q*), since he is not entitled to immediate possession. The test of the plaintiff's right may be summed up thus: "Whenever the plaintiff could have resumed the property, if he could lay his hands upon it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled in an action for conversion to recover the value of it as damages" (*r*).

In so far as the case of *Johnson v. Stear* decided that the pledgee was liable in trover in the circumstances of that case, it cannot be supported. (*Vide* Addison on Torts (8th ed.) at p. 578.)

If the pledgee sells the goods, the owner's right of possession will not; *ipso facto*, revert so as to enable the owner to bring an action for conversion (*s*). The owner may sue for breach of the terms of the agreement of pledge, but the damages would not be the full value of the goods, but only the damage done to the owner's interest therein (*t*).

Goods held
under a lien.

But in the case of a creditor holding goods under a lien, if the lien be violated by the creditor in such a manner as to put an end to it, *e.g.*, by sale, the owner's right will *ipso facto* revive (*u*), and the owner will be entitled in an action for conversion to recover the full value of the goods (*u*).

Reversioner.

If the owner of goods has by contract parted with the possession of them for a time, so that he only retains a reversionary interest in them, he cannot maintain an action for conversion against any wrong-doer—whether a stranger or not—since he is not even in constructive possession (*x*). But, notwith-

(*n*) *Dockwray v. Dickenson*, (1696) Skinn. 640; *Addison v. Overend*, (1796) 6 T. R. 766; *Bloxam v. Hubbard*, (1804) 5 East, 407; cf. *Cameron v. Wynch*, (1846) 2 C. & K. 264.

(*o*) *Dockwray v. Dickenson*, *ubi supra*; *Addison v. Overend*, *ubi supra*, at p. 770.

(*p*) *Taylor v. Parry*, (1840) 1 M. & Gr. 604, *per* Tindal, C.J., at p. 611.

(*q*) *Donald v. Suckling*, (1866) L. R. 1 Q. B. 585.

(*r*) *Johnson v. Stear*, (1863) 15 C. B. N. S. 330, *per* Williams, J., at p. 340; cf. *Johnson v. L. & Y. Ry. Co.*, (1878) 3 C. P. D. 499, at p. 509.

(*s*) *Halliday v. Holgate*, (1868) L. R. 3 Ex. 299, *per* Willes, J., at p. 302.

(*t*) Cf. *Johnson v. Stear*, *ubi supra*, with the comments thereon by Blackburn, J., in *Donald v. Suckling*, (1866) L. R. 1 Q. B. 585, at p. 617.

(*u*) *Mulliner v. Florence*, (1878) 3 Q. B. D. 484; cf. *Johnson v. L. & Y. Ry. Co.*, *ubi supra*.

(*x*) Cf. *Bradley v. Copley*, (1845) 1 C. B. 685; Addison on Torts (8th ed.), at p. 578.

standing such bailment, the owner may bring what was formerly known as an action upon the case or an action for negligence in respect of permanent injury to his goods (*y*).

If, however, the goods be bailed or hired upon the terms that the right to possession reverts in the bailor upon seizure by a sheriff or bailiff, the sheriff or bailiff will be liable for conversion in an action brought by the bailor, *i.e.*, the reversionary owner (*z*).

One factor which affects the measure of damages recoverable for conversion of goods is the question as to whether or not the plaintiff was under any obligation to sell the goods.

Where the plaintiff is under an obligation to sell his goods.

If at the date of seizure of the goods the plaintiff was under such obligation, as, for instance, in the case of a bankrupt, the prices realized by a sale of the goods by the defendant, if the sale has been conducted in a proper manner, may be regarded as the fair measure of damages (*a*).

The court may in proper cases even deduct from the damages the expenses of selling (*b*).

If the plaintiff had entered into a contract of sale in respect of the goods converted, prior to the seizure, he might be able to recover the price fixed in the contract of sale, either as special damages (*c*), or indirectly by such price being taken as evidence of the value of the goods (*d*).

Where actual contract for sale exists.

If the plaintiff was under no obligation of any kind to sell his goods at the date of their seizure, he is, at the least, entitled to be compensated with such damages as will enable him to replace his goods (*e*).

If the act of conversion amounts to pound breach, the defendant will be liable to the landlord for pound breach and to the owner of the goods for conversion (*f*). The owner's damages under such circumstances cannot exceed the value of the goods distrained (*f*).

Conversion and pound breach.

It is to be observed that a wrong-doer, either in trespass or trover, is only liable to make satisfaction once, and damages cannot be obtained against him both by a bailor and a bailee (*g*). Perhaps the reason for this is the fact that the

Defendant only liable to pay damages once.

(*y*) *Mears v. L. & S. W. Ry. Co.*, (1862) 11 C. B. N. S. 850; cf. *Hall v. Pickard*; (1812) 3 Camp. 187.

(*z*) *Jelks v. Hayward*, [1905] 2 K. B. 460.

(*a*) *Whitmore v. Black*, (1844) 13 M. & W. 507; *Whitehouse v. Atkinson*, (1828) 3 C. & P. 344.

(*b*) *Clarke v. Nicholson*, (1834) 6 C. & P. 712; cf. *Smith v. Baker*, (1873) L. R. 8 C. P. 350.

(*c*) Cf. *Reid v. Fairbanks*, (1853) 22 L. J. C. P. 206, *per* Cresswell, J., at p. 208. *Vide infra*, p. 105.

(*d*) *France v. Gaudet*, (1871) L. R. 6 Q. B. 199.

(*e*) *Glasspoole v. Young*, (1829) 9 B. & C. 696.

(*f*) *Turner v. Ford*, (1846) 15 M. & W. 212, *per* Parke, B., at p. 215.

(*g*) *The Winkfield*, [1902] P. 42, *per* Collins, M.R., at p. 61; *Nicholls v. Bastard*, (1835) 2 Cr. M. & R. 659, at p. 660.

recovery of damages in conversion vests the property in the subject-matter in the defendant (*h*) as from the date of conversion (*h*). On the other hand, a judgment which is not satisfied does not vest the property in the defendant (*i*).

Joint tortfeasors.

Nevertheless, a judgment against one of two joint tortfeasors, although it is not satisfied, is a bar to an action against the other tortfeasor (*k*), provided the causes of action against both are identical (*l*).

A satisfied judgment acts as an involuntary sale.

It has been said that the theory of the judgment in an action of detinue (or conversion) is that it is a kind of involuntary sale of the plaintiff's goods to the defendant (*m*). The court awards the plaintiff the value of the goods (*n*). If he does not get that value, then he does not lose his property in the goods (*n*).

Value of goods as assessed by the court is conclusive.

Here it may be remarked that the value of the goods as determined by the court, in an action for conversion, is conclusive. In *Buckland v. Johnson*, (1854) 15 C. B. 145, it was held by Maule, J., and Cresswell, J., that the plaintiff must be deemed to have submitted the assessment of the true value of the goods to the verdict of the jury.

It is true that a certain dictum of Jervis, J., in *Buckland v. Johnson* was overruled in *Brinsmead v. Harrison*, (1871) L. R. 6 C. P. 584, but it is submitted that the above contention as expressed by Maule, J., and Cresswell, J., is clearly established law.

The suggestion, therefore, that, unless the full value of the goods has been recovered in one action for conversion, as opposed to the value awarded by the court in that action, a further action for the balance might lie against another defendant (*o*), is, it is submitted, quite untenable.

In the case of *Morris v. Robinson*, Bayley, J., and Holroyd, J., expressed the view that where an action in trover in respect of the same goods might lie against two sets of defendants, the court might award in one action a less sum as damages than the full value of the goods, on the ground that a second action might be brought (*p*).

(*h*) *Buckland v. Johnson*, (1854) 15 C. B. 145, per Jervis, J., at p. 162, partially overruled in *Brinsmead v. Harrison*, vide *infra*; *Cooper v. Shepherd*, (1846) 3 C. B. 266, at p. 272; see 6 M. & G. 640, note; *Morris v. Robinson*, (1824) 3 B. & C. 196, at p. 206.

(*i*) *Brinsmead v. Harrison*, (1871) L. R. 6 C. P. 584; approved in *Ex parte Drake*, (1877) 5 Ch. D. 866.

(*k*) *Brinsmead v. Harrison*, *ubi supra*; affirmed L. R. 7 C. P. 547; *King v. Hoare* (1844) 13 M. & W. 494; affirmed *Kendall v. Hamilton*, (1879) 4 App. Cas. 504.

(*l*) Cf. *Wegg Prosser v. Evans*, [1894] 2 Q. B. 101; affirmed [1895] 1 Q. B. 108.

(*m*) Bac. Abr. Trover (A.).

(*n*) *Ex parte Drake*, *ubi supra*, per Jessel, M.R., at p. 871.

(*o*) Cf. *Morris v. Robinson*, (1824) 3 B. & C. 196, per Bayley, J., and Holroyd, J., at pp. 205, 206.

(*p*) *Morris v. Robinson*, (1824) 3 B. & C. 196, at pp. 205, 206.

It is submitted that this view is not now maintainable. In the course of his judgment Holroyd, J., said that, in an action against a sheriff for an escape, small damages are often given on the ground that as the debt is not extinguished the whole amount of it may afterwards be recovered in an action against the debtor. If this latter proposition be really analogous, it may be remarked that it has since been overruled (*q*).

But it is submitted that, even apart from the general proposition as to whether damages can ever be diminished on account of the possibility of recovering other damages from third parties (as to the doubtfulness of which *vide* Chap. II. at p. 19), certainly in the case of successive actions in trover, no such doctrine can possibly apply, and for the following reasons:—

- (1) In an action for conversion the measure of damages is the full value of the goods as assessed by the court (*r*), or the plaintiff's interest in such value, if the plaintiff be a bailor and the defendant a bailee.
- (2) Satisfaction of the judgment obtained in an action for conversion has the effect of transferring the property in the goods from the plaintiff to the defendant (*s*).
- (3) A plaintiff could not, it is submitted, lawfully obtain satisfaction of a second judgment in a second action in conversion, since the effect of his obtaining two satisfied judgments for conversion of the same goods must—whatever the real actual value of the goods might be—in the eyes of the law be tantamount, it is submitted, to obtaining double satisfaction (see (*1*)). The courts of equity would interfere to prevent double satisfaction (*t*). A further effect of a plaintiff obtaining two satisfied judgments would be to produce the absurd dilemma of a vesting by the court of the same property in two separate sets of defendants (*u*).

A plaintiff cannot obtain satisfaction of two successive judgments for conversion of the same goods by different defendants.

In *Morris v. Robinson* it is to be noted that the first verdict was not given in trover. In *Buckland v. Johnson*, Maule, J., at p. 166 says “the plaintiff having once recovered in respect of the same goods cannot recover again against somebody else.”

In an action for conversion of a negotiable instrument the measure of damages is *prima facie* the face value of the instrument (*x*).

Conversion of negotiable instrument.

Interest may be recovered to the date of the verdict by virtue of 3 & 4 Will. 4, c. 42, s. 29. It was in fact recoverable, apart

(*q*) Cf. *Arden v. Goodacre*, (1851) 11 C. B. 371.

(*r*) *Vide supra*, pp. 97, 102.

(*s*) *Vide supra*, p. 102.

(*t*) *Morris v. Robinson*, (1824) 3 B. & C. 196, at pp. 205, 206.

(*u*) Cf. *Buckland v. Johnson*, (1854) 15 C. B. 145, *per* Jervis, J.

(*x*) Cf. *Bavins v. L. & S. W. Bank*, [1900] 1 Q. B. 270.

from the statute, though conflicting decisions were given as to the date to which interest might run (*y*).

Although the *prima facie* measure of damages for conversion of a bill of exchange is the face value, it would seem that under certain circumstances the court may take into consideration extraneous factors tending to diminish the value and consequently the damages (*z*).

If a document purporting to be a bill or note can be shown to have been worthless and not a genuine security at the date of its conversion, the measure of damages is purely nominal—the value of the paper itself (*a*).

But, where an instrument is not wholly void, it is submitted that, in view of more recent decisions as to the time at which the value of converted property may be assessed, greater damages may be recoverable than the value of the instrument at the actual date of its conversion (*b*). If the instrument has become enhanced in value while in the defendant's possession, such increase might be recovered (*b*).

If the defendant, subsequently to the conversion, diminish the value of the instrument by his own act, the plaintiff can still recover the original full value of the instrument (*c*).

If a defendant, subsequently to the conversion of a bill, obtain part payment thereof, the measure of damages still remains at the figure representing the original value of the bill (*d*). The defendant may, however, by bringing the bill and the amount received in part payment into court, escape with merely nominal damages (*e*).

Conversion of
title deeds.

In an action for conversion of title deeds, the measure of damages is the full value of the estate to which they appertain. In practice, however, such an action is dealt with as one of detainee, and the judgment provides that upon the restoration of the deeds the damages are to be reduced to a merely nominal sum (*f*).

Conversion of
fixtures.

If a plaintiff seeks to recover damages for the wrongful removal of fixtures under a distress, and he brings an action for conversion, he can only recover in such action the mere value of the fixtures as chattels (*g*).

(*y*) Cf. *Mercer v. Jones*, (1813) 3 Camp. 477; *Paine v. Pritchard*, (1827) 2 C. & P. 558.

(*z*) Cf. *Delegal v. Naylor*, (1831) 7 Bing. 460.

(*a*) *Mathew v. Sherwell*, (1810) 2 Taunt. 439; *Wills v. Wells*, (1818) 8 Taunt. 264.

(*b*) *Vide supra*, p. 98; cf. *Johnson v. Hook*, (1883) 1 Cab. & El. 89; 31 W. R. 812.

(*c*) *McCleod v. McGhie*, (1841) 2 M. & G. 326.

(*d*) *Alsager v. Close*, (1842) 10 M. & W. 576.

(*e*) *Alsager v. Close*, *ubi supra*, at p. 584.

(*f*) *Loosemore v. Radford*, (1842) 9 M. & W. 657, 659; *Coombe v. Sansom*, (1822) 1 Dow. & Ry. (K. B.) 201.

(*g*) *Clarke v. Holford*, (1848) 2 C. & K. 540; cf. *Thurston v. Charles*, (1905) 21 T. L. R. 659.

Where the subject-matter of the conversion consists of live stock, it would appear that the tortfeasor cannot plead in mitigation of damages any sum which he may have expended in feeding and keeping the live stock (*h*).

Conversion of live stock.

There is a special statutory rule with regard to the limitation of damages in any action brought in respect of the seizure of goods by way of forfeiture under any act dealing with customs. By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 267, it is enacted that, if the judge or justice shall hold that there was reasonable or probable cause for seizure, the plaintiff shall not be entitled to more than twopence damages, nor to any costs nor shall the defendant be fined more than one shilling.

Seizure of goods under a Customs Act.

It would seem that damages for conversion may be recovered in respect of a chattel which has never existed. If the defendant has represented to the plaintiff that he has secured a chattel on the plaintiff's behalf, he cannot be heard to deny its existence in an action for conversion (*i*).

Conversion by estoppel.

By the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29, the jury may award interest as damages, over and above the value of the goods at the time of conversion.

Recovery of interest upon value of goods.

Special damages over and above the value of the goods converted may be recovered, provided that they are not too remote (*k*) (*vide* Chap. II., Section I., *supra*, Damages in Tort), and are specially pleaded.

Special or consequential damages.

In other words, the consequential loss must be an immediate and necessary consequence of the conversion, if special damages are to be recovered (*l*).

Thus, the future earnings of a chattel which has been converted cannot, as a rule, be recovered, but only its "actual present value" (*m*).

If, however, the defendant had notice of the inconvenience likely to be occasioned, he may be mulcted in respect of such inconvenience (*n*).

If the value of the goods converted is in doubt, as for instance where the tortfeasor refuses to produce the goods, every

Omnia prae-sumuntur contra spoliatorem.

(*h*) *Wormer v. Biggs*, (1845) 2 C. & K. 31; cf. *Mulliner v. Florence*, (1878) 3 Q. B. D. 484, *per* Bramwell, L.J., at p. 491.

(*i*) *Harding v. Carter*, (1781) Park's Marine Insurance (8th ed.), p. 5, *per* Lord Mansfield.

(*k*) *Bodley v. Reynolds*, (1846) 8 Q. B. 779; *Wood v. Bell*, (1856) 25 L. J. Q. B. 148; *Davis v. Oswald*, (1837) 7 C. & P. 804; cf. *France v. Gaudet*, (1871) L. R. 6 Q. B. 199. *France v. Gaudet* is not a case where special damages were recovered, but evidence of a sub-contract was admitted in order to estimate the value of the goods. Cf., however, *Reid v. Fairbanks*, (1853) 22 L. J. C. P. 206, at p. 208.

(*l*) *Moon v. Raphael*, (1835) 2 Bing. N. C. 310, at p. 315.

(*m*) *Reid v. Fairbanks*, (1853) 22 L. J. C. P. 206, *per* Maule, J., at p. 208; cf. *Wood v. Bell*, (1856) 5 E. & B. 772, at p. 796; *The Argentino*, (1888) 13 P. D. 191.

(*n*) *Bodley v. Reynolds*, *ubi supra*; *Davis v. Oswald*, *ubi supra*. *Per contra*, *vide supra*, p. 16.

presumption is made in the plaintiff's favour in order to swell the damages (o).

Vindictive
damages not
recoverable.

Exemplary or vindictive damages are not recoverable in an action for conversion. This forms one of the distinguishing features between actions for conversion and actions for trespass (p).

Reduction of
damages after
verdict given.

The court may in the exercise of its equitable jurisdiction reduce the damages in a case of conversion even after verdict given. Thus, in proper circumstances, execution may be withheld, except for such part of the sum awarded as damages as subsequent events may render it just and equitable that the plaintiff should obtain (q). Formerly such relief could only be obtained by the defendant issuing a writ of *audita querelâ* (q).

Detinue.

Detinue
defined.

In an action of detinue the plaintiff seeks to recover a chattel or goods of which he has been deprived, and nominal or greater damages for its or their detention. The form of judgment is usually an order for the delivery of the chattel—together with nominal damages for its detention (r).

If the defendant cannot return the chattel he must pay its value (s).

Since a judgment in detinue ordinarily gives the defendant an alternative method of rendering satisfaction to the plaintiff, the property in the subject-matter of the action is not vested in the defendant unless and until the plaintiff issues and obtains execution for the value thereof (t).

Measure of Damages.

Penal or vindictive damages cannot be recovered in detinue (u); but if the plaintiff has in fact incurred substantial loss by the wrongful detention of his property, he may recover substantial damages (x).

In calculating the damages for detention it would seem that the court is entitled to award the highest value to which the goods may have fluctuated during the period of detention—less their value on the date when they were received back (y).

(o) *Armory v. Delamirie*, (1722) 1 Str. 504; *Mortimer v. Cradock*, (1843) 12 L. J. C. P. 166.

(p) *Vide infra*, p. 109.

(q) *Plevin v. Henshall*, (1833) 10 Bing. 24.

(r) Cf. *Wintle v. Rudge*, (1841) 5 Jur. 274.

(s) *Ex parte Vaughan, In re Riddleough*, (1884) 14 Q. B. D. 25.

(t) 6 M. & Gr. 640, n.; *vide* R. S. C., Ord. XLII., r. 6; cf. *Brinsmead v. Harrison*, (1871) L. R. 6 C. P. 584.

(u) *Dreyfus v. Peruvian Guano Co.*, (1889) 42 Ch. D. 66, *per* Bowen, L.J., at p. 75 (citation).

(x) *Dreyfus v. Peruvian Guano Co.*, *ubi supra*; cf. *Barrow v. Arnaud*, (1846) 8 Q. B. 595.

(y) *Archer v. Williams*, (1846) 2 C. & K. 27, *per* Cresswell, J., at p. 28; cf.

But evidence as to value must be forthcoming. Otherwise the damages either for detention, or for value and detention, can only be nominal (*z*).

Where the action of detinue is in respect of several separate articles, the jury must separately assess the value of each (*z*).

It may be observed that the above-mentioned method of the assessment of damages in detinue, upon goods whose value has varied, corresponds with that employed in actions of trover (*a*). The rules as to obtaining a stay of proceedings upon delivery of the goods are also similar in trover and detinue (*b*).

If all or any of the goods have been delivered up after action brought, the plaintiff may recover damages for their detention if any has been sustained; as regards the residue not delivered up, he may have a writ of delivery (*c*).

If there be a good defence with regard to a part of the goods in respect of which the action is brought, *e.g.*, that the defendant was always ready to deliver them up, the jury must separately assess the value of the residue and the damages for the detention of such residue, but must give no damages for detention of the other part. If part of the goods have been delivered up, and part retained, and the defendant has no defence in respect of the prior detention of such goods as he delivered up, the jury must assess the damages for the prior detention of such goods as have been delivered up, separately, from the damages in respect of the goods retained (*d*).

Formerly, the defendant in an action for detinue could either elect to return the chattel detained or pay its value as damages (*e*).

But now, if it lies within the defendant's power to return the chattel, he may be ordered to return it (*f*) upon the plaintiff's application (*f*).

But, it is to be observed that the court need only order the return of the chattel according to its discretion (*g*). If, therefore the defendant acting honestly and in a *bonâ fide* manner has enhanced the value of the chattel, the court might order—it would appear—that the return of the chattel should be conditional upon the plaintiff giving compensation to the defendant (*h*).

Order for the return of chattel detained.

Compensation to defendant.

Williams v. Archer, (1847) 5 C. B. 318, *per* Parke, B., at p. 325. The head-note to *Williams v. Archer* is not quite correct.

(*z*) *Anderson v. Passman*, (1835) 7 C. & P. 193; *cf.* Roll. Abr., Detinue (E.).

(*a*) *Cf.* *Johnson v. Hook*, (1883) 1 Cab. & El. 89; *vide supra*, p. 98.

(*b*) *Vide supra*, pp. 97, 98; *Phillips v. Hayward*, (1835) 3 Dowl. 362.

(*c*) *Crossfield v. Such*, (1852) 8 Exch. 159, *per* Parke, B., at p. 165.

(*d*) *Crossfield v. Such*, *ubi supra*, at p. 164; *cf.* *Pawly v. Holly*, (1773) 2 W. Bl. 853.

(*e*) *Cf.* *Phillips v. Jones*, (1850) 15 Q. B. 859, at p. 867.

(*f*) R. S. C., Ord. XLVIII., r. 1.

(*g*) *Cf.* *Chilton v. Carrington*, (1855) 15 C. B. 730, *per* Maule, J., at p. 740.

(*h*) *Cf.* *Peruvian Guano Co. v. Dreyfus Bros. & Co.*, [1892] A. C. 166, *per* Lord Macnaghten, at p. 176.

Return of securities void under Money-lenders Act, 1900.

Recently the question has arisen as to whether securities given to a money-lender may be recovered, without giving any compensation to the money-lender, in cases where the money-lending transaction is void under the Money-lenders Act, 1900. Since an action of detinue is a purely common law action, and in no sense a claim for equitable relief, it would appear that a plaintiff can recover securities so given without any condition being imposed upon him (*i*).

Possibly, however, the safest course to pursue would be for the plaintiff to couple his claim in detinue with a claim for a declaratory judgment under Ord. XXV., r. 5, R. S. C., declaring the money-lending transaction void (*i*).

Metropolitan Police Courts Act, 1839.

By the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 40, where goods, of a value not greater than 15*l.*, are wrongfully detained by any one within the limits of the metropolitan police district, a magistrate may order them to be delivered up or their value to be paid to the owner. An order under this statute is no bar to an action for special damage consequent upon the wrongful detention (*k*).

Trespass.

Trespass defined.

Trespass to goods consists in the wrongful interference by one person with the goods of another. Such trespass may be committed by actually removing the goods or by dealing with them in other ways. Trespass is essentially a wrong done to the actual possessor and therefore cannot be committed by a person in lawful exclusive possession, even though such person be not the owner of an indefeasible title to the goods (*l*).

Who may sue.

Thus, no action for trespass can be maintained by a person who by contract has entirely parted with all right to possession of his goods for a certain period, in respect of injury done to the goods during such period (*m*). But, such person might bring an action for negligence in respect of permanent damage caused by such injury (*n*), or he might bring what was formerly known as an action upon the case, in respect of such permanent damage (*o*).

On the other hand, an action for trespass may be maintained

(*i*) Cf. *Chapman v. Michaelson*, [1909] 1 Ch. 238, per Cozens-Hardy, M.R., at p. 242; *Tregoning v. Attenborough*, (1830) 7 Bing. 97; cf., however, *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300, at pp. 310, 311.

(*k*) *Midland Ry. Co. v. Martin*, [1893] 2 Q. B. 172.

(*l*) *Johnson v. Diprose*, [1893] 1 Q. B. 512; cf. *Balme v. Hutton*, (1833) 9 Bing. 471, at p. 477. *Vide supra*, p. 96.

(*m*) *Hall v. Pickard*, (1812) 3 Camp. 187; cf. *Tancred v. Allgood*, (1859) 4 H. & N. 438, per Pollock, C.B., at p. 444; Addison on Torts (8th ed.), at p. 578; *Bradley v. Copley*, (1845) 1 C. B. 685; cf., however, *Mears v. L. & S. W. Ry. Co.*, (1862) 11 C. B. N. S. 850, per Erle, C.J., at p. 854.

(*n*) *Mears v. L. & S. W. Ry. Co.*, *ubi supra*.

(*o*) *Hall v. Pickard*, *ubi supra*.

by a person who is only in "constructive" and not in physical possession of his goods, *e.g.*, a bailor who can reclaim his goods at any time from his bailee. It follows, therefore, that an action in trespass may be brought either by a person in physical possession or by a person in constructive possession of the same goods, but the defendant cannot be compelled to satisfy two claims in respect of the same injury (*p*).

Measure of Damages.

Nominal damages, at least, can be recovered in every case where an actual trespass has been committed, even though no damage has resulted (*q*).

Where, however, the plaintiff is totally deprived of his goods by means of the trespass, the full value of the goods is recoverable (*r*).

Thus, speaking generally, it may be said that the damages recoverable in an action for trespass to goods is, ordinarily, not less than the value of the goods, or the amount of the loss sustained through the injury done to them (*s*). The value of the goods is estimated in the same manner as in actions for trover. (*Vide supra*, pp. 98, 99.)

But a fundamental distinction exists between the damages recoverable in trover and those recoverable in trespass.

Thus, whereas, in trover, no damages can be awarded beyond such sum as will cover the loss sustained (*t*), in trespass, the damages are not so strictly confined, and in proper cases vindictive damages may be awarded (*u*).

It has been held in one case that, in an action for trespass, a defendant cannot plead, in mitigation, a subsequent payment to the plaintiff of the proceeds of the sale of his goods (*x*), but it is doubtful whether such a decision would now be upheld (*a*); though, of course, even if the goods themselves are returned to the plaintiff, the latter may, none the less, sue in trespass for some measure of general damages, or for special damages, if any, incurred (*b*).

Further, whereas, in trover, if the plaintiff was under an obligation to sell his goods, the price realised by the tortfeasor

Vindictive
damages.

Difference
between
damages

(*p*) Cf. *The Winkfield*, [1902] P. 42, *per* Collins, M.R., at p. 61.

(*q*) *Bayliss v. Fisher*, (1830) 7 Bing. 153; cf. *The Greta Holme*, [1897] A. C. 596.

(*r*) *Gillard v. Brittan*, (1841) 8 M. & W. 575; cf. *The Winkfield*, [1902] P. 42, at p. 60.

(*s*) Cf. *Sowell v. Champion*, (1837) 6 A. & E. 407, *per* Patteson, J., at p. 412.

(*t*) *Vide supra*, pp. 97, 106.

(*u*) *Williams v. Currie*, (1845) 1 C. B. 841; *Brewer v. Dew*, (1843) 11 M. & W. 625 at p. 629; cf. *Gregory v. Cotterell*, (1852) 1 E. & B. 360; *The Mediana*, [1900] A. C. 113, *per* Lord Halsbury, at pp. 117 and 118.

(*x*) *Rundle v. Little*, (1844) 8 Q. B. 174.

(*a*) Cf., however, *Goldsmid v. Raphael*, (1836) 3 Sco. 385; *Brunswick v. Slowman*, (1849) 8 C. B. 317.

(*b*) *Laugher v. Bepitt*, (1822) 5 B. & Ald. 762; cf. *Walshaw v. Brighthouse* (*Mayor of*), [1899] 2 Q. B. 286. As to return of goods in cases of trover, *vide supra*, p. 98.

recoverable in
conversion
and in
trespass.

upon a sale by him would, in proper cases, restrict the measure of damages to such sum (*c*), in trespass, no such restriction upon or presumption as to the measure of damages would arise (*d*). Again, in a case of conversion of fixtures, the damages are to be assessed upon the basis merely of their value as chattels (*e*), whereas, in a case of trespass, their value as fixtures may be recovered (*f*). In other words, in the latter case, damages are obtainable in respect of the acquired or factitious value of the chattels (*f*).

Thus, it may be said that, broadly speaking, in trespass, the damages are unlimited; in trover, they are limited to the value of the property (*g*). In trespass, general damages may be freely recovered; in trover, nothing more than nominal damages can be recovered by way of general damages.

Special or
consequential
damages.

In addition to the damage done to the intrinsic value of the goods which form the subject-matter of a trespass, consequential or special damage resulting may be recovered (*h*), if not of too remote a character (*i*). Thus, in proper cases, damages may be recovered in respect of injury to credit and reputation (*k*).

Collisions
at sea.

Further, where a vessel is injured at sea and becomes totally lost, the measure of damages is not restricted to the market value of the ship at the date of wreck; its value at the date of the completion of the voyage together with the profit which would have been earned under its charterparties—less a reasonable percentage for contingencies—may be recovered (*l*).

It may be observed that if a ship be run down and injured, and is subsequently lost, there is even a legal presumption that such subsequent loss is consequent upon the collision (*m*), though, of course, the presumption may be rebutted by direct proof of subsequent negligence on the part of the crew of the injured ship (*n*).

(*c*) *Vide supra*, p. 101.

(*d*) *Lockley v. Pye*, (1841) 8 M. & W. 133.

(*e*) *Vide supra*, p. 104.

(*f*) *Thompson v. Pettitt*, (1847) 10 Q. B. 101; *Moore v. Drinkwater*, (1858) 1 F. & F. 134; cf. *Wennhak v. Morgan*, (1888) 20 Q. B. D. 635; *Thurston v. Charles*, (1905) 21 T. L. R. 659, *per* Walton, J.

(*g*) *Balme v. Hutton*, (1833) 9 Bing. 471, at p. 477; *Lockley v. Pye*, (1841) 8 M. & W. 133, *per* Alderson, B., at p. 135.

(*h*) *Gilbertson v. Richardson*, (1848) 5 C. B. 502; *Keene v. Dilke*, (1849) 4 Exch. 388; *The Black Prince*, (1862) 1 Lush. 568; cf. *The Greta Holme*, [1897] A. C. 596; *The Marpessa*, [1907] A. C. 241; *Walshaw v. Brighthouse (Mayor of)*, [1899] 2 Q. B. 286; c.f., however, *Hobbs v. Winchester Corporation*, [1910] 2 K. B. 471, at p. 485.

(*i*) *Holloway v. Turner*, (1845) 6 Q. B. 928; *Walker v. Olding*, (1862) 1 H. & C. 621; *The Princess*, (1885) 52 L. T. 932; *Nicosia v. Vallone*, (1877) 37 L. T. (P. C.) 106; *The City of Peking*, (1890) 15 App. Cas. 438; cf. *The Mediana*, [1900] A. C. 113; *The Notting Hill*, (1884) 9 P. D. 105.

(*k*) *Brewer v. Dew*, (1843) 11 M. & W. 625, at p. 630; cf. *Smith v. Enright*, (1893) 69 L. T. 724, *per* Charles, J., at p. 725; cf., however, *Nicosia v. Vallone*, *ubi supra*.

(*l*) *The Kate*, [1899] P. 165; *The Racine*, [1906] P. 273.

(*m*) *The Mellona*, (1847) 3 W. Rob. 7.

(*n*) *The Flying Fish*, (1865) 34 L. J. Adm. 113.

If a ship be damaged, but not destroyed, by collision, the wrong-doer must pay full compensation—there being no deduction of “one third new for old” in the cost of repairs as in the case of insurance (o).

In the case of *The Marpessa*, [1907] A. C. 241, at p. 244, the Lord Chancellor said, “until the case of *The Greta Holme* (p) the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages, and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error and decided that, in such a case, general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases.”

Compensation for the non-employment of the ship during repair is a part of the *restitutio in integrum* to which the plaintiff is entitled, and itself consists of the expense of detention and the amount of profit lost (q).

The general rule that amongst joint tortfeasors there is no contribution (r) is subject to an exception in the case of collisions at sea. In admiralty cases, a rule exists that, where a collision occurs and both ships are found to have been at fault, the damage arising therefrom shall be borne equally by the owners of the two vessels (s). This rule applies to consequential damage, e.g., in a case where a third ship is injured (t), and also applies as between the owners of the respective cargoes on the ships concerned (u). It has however, now been modified by the Maritime Conventions Act, 1911 (v), s. 1, which provides that the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault (x).

Admiralty rules with regard to incidence of damage.

It is to be noted that the owner of an injured vessel not in fault, in fact, even the owner of a tow attached to a vessel in fault, may recover his entire damage or loss from the owner of either of two vessels which were in fault (y), and that the Maritime Conventions Act, 1911, s. 1, applies to the division of loss between the owners in such cases (z).

(o) *The Gazelle*, (1844) 2 W. Rob. 279; *The Pactolus*, (1856) Swab. 173, at p. 174.

(p) [1897] A. C. 596.

(q) *The Inflexible*, (1857) Swab. 200.

(r) *Vide supra*, p. 19, *infra*, pp. 299, 300.

(s) *Cayzer v. Carron Co.*, (1884) 9 App. Cas. 873, at p. 881; *The Frankland* [1901] P. 161.

(t) *The Frankland*, *ubi supra*.

(u) *The Milan*, (1861) Lush. 388; *The Drumlanrig*, [1911] A. C. 16.

(v) 1 & 2 Geo. 5, c. 57.

(x) Cf. *The Rosalia*, [1912] P. 109.

(y) *The Devonshire*, [1912] P. 21; affirmed, 28 T. L. R. 551.

(z) *The Cairnbahn*, (1912) 29 T. L. R. 60.

Where loss of probable profit can be proved, damages in respect of such loss will be given (*a*), but not where there existed, no likelihood of any profit being actually made (*b*).

Costs of other proceedings.

In proper cases, a plaintiff can recover, as special damages the costs of prior proceedings entailed by the defendant's act of trespass (*c*).

Payments necessitated through defendant's act.

Similarly, in an action against a sheriff for wrongful seizure, the plaintiff may recover from him the amount necessarily paid for the recovery of his—the plaintiff's—goods to the third party into whose possession the goods had subsequently passed (*d*).

Furthermore, if a sheriff, in executing a writ of *fieri facias*, break upon the plaintiff's house by force, he becomes a trespasser *ab initio* (*e*). The plaintiff, in such a case, may recover as special damages the sum paid by him for the execution to be withdrawn, notwithstanding the fact that the execution, in itself, was valid, apart from the wrongful entry (*f*).

Recovery of interest upon value of goods.

By virtue of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29, the court may award damages, in the nature of interest, over and above the value of the goods which form the subject of the trespass (*g*).

Mitigation of damages.

In mitigation of damages, the defendant may adduce evidence to show that the subject-matter of the trespass was of little or no value (*h*). He may also adduce evidence tending to rebut the allegations of malice, and allegations as to special damage incurred.

On the other hand, it is not relevant to show, in mitigation of damages, that the plaintiff owed money to the defendant, in respect of the goods affected (*i*), unless the plaintiff actually held the goods subject to a mortgage or charge in favour of the defendant (*k*).

It is quite irrelevant and inadmissible to show that the plaintiff held the goods subject to a charge in favour of a third party (*l*).

(*a*) *The Argentino*, (1889) 14 App. Cas. 519; *The Kate*, [1899] P. 165.

(*b*) *Cf. The Bodlewell*, [1907] P. 286.

(*c*) *Cf. Tindall v. Bell*, (1843) 11 M. & W. 228; *Pritchett v. Boevey*, (1833) 1 Cr. & M. 775; *cf.*, however, *Holloway v. Turner*, (1845) 6 Q. B. 928; *Loton v. Devereux*, (1832) 3 B. & Ad. 343; *The British Commerce*, (1884) 9 P. D. 128; *The Rigel*, [1912] P. 99. *Vide infra* at p. 306.

(*d*) *Keene v. Dilke*, (1849) 4 Exch. 388.

(*e*) *Semayne v. Gresham*, (1605) 5 Co. Rep. 91.

(*f*) *Brunswick v. Slowman*, (1849) 8 C. B. 317; *cf. Kerbey v. Denby*, (1836) 1 M. & W. 336.

(*g*) *Cf. The Kong Magnus*, [1891] P. 223.

(*h*) *Du Bost v. Beresford*, (1810) 2 Camp. 511; *Fores v. Jones*, (1802) 4 Esp. 97; *Wells v. Head*, (1831) 4 C. & P. 568.

(*i*) *Gillard v. Brittan*, (1841) 8 M. & W. 575; *Attack v. Bramwell*, (1863) 3 B. & S. 520.

(*k*) *Brierly v. Kendall*, (1852) 17 Q. B. 937; *Toms v. Wilson*, (1863) 4 B. & S. 442, at p. 458.

(*l*) *Heydon and Smith's Case*, (1611) 13 Co. Rep. 67, at p. 69; *cf. Turner v. Hardcastle*, (1862) 11 C. B. N. S. 683; *cf. also Goldsmid v. Raphael*, (1836) 3 Sco. 385.

No evidence in mitigation of damages can be tendered to show that the plaintiff had insured his goods and that he has, in fact, received thereby compensation for the defendant's trespass (*m*).

Each one of several co-trespassers is liable for the entire damage done (*n*). But, if there is more than one defendant, the malice actuating one should not be visited upon a less guilty defendant in the form of aggravated damages (*o*).

Joint tort-feasors.

Illegal Distress.

An illegal distress is a distress carried out by a person who is a trespasser *ab initio*. Such distress may be wrongful by reason of the distrainer having no right to distrain at all (*p*), or by his distraining after tender, or by his committing, at the outset, an act which invalidates all acts and proceedings subsequent thereto (*q*). For a comprehensive survey of the acts which may constitute an illegal distress, the reader is referred to Bullen on Distress (2nd ed.), and to the Law of Distress Amendment Act, 1908 (*r*).

Illegal distress defined.

A person committing an illegal distress may be sued in an action of trespass to land, and, in such action, damages may be recovered for injury done to goods and chattels (*s*). He may, alternatively, in proper cases, be sued for trespass to goods, or for trover, or for detinue, or for replevin. Either the distrainer himself, or the landlord authorising the distraint, may be sued, or both of them may be made co-defendants (*t*).

Causes of action.

Who may be sued.

Measure of Damages.

The measure of damages for illegal distress is, ordinarily, the full value of the goods of which the plaintiff has been deprived, without any deduction for rent (*u*).

The plaintiff can recover some damages, even though he was not actually deprived of the use of his goods by the defendant's wrongful seizure (*x*). In other words, general damages are recoverable.

Proof of special damage not essential.

(*m*) *Yates v. White*, (1838) 4 Bing. N. C. 272.

(*n*) *Hulme v. Oldacre*, (1816) 1 Stark. 352; cf., however, *Harrington v. Derby Corporation*, [1905] 1 Ch. 205.

(*o*) *Clark v. Newsam*, (1847) 1 Exch. 131, at pp. 139 and 140; cf. *Gregory v. Cotterell*, (1852) 22 L. J. Q. B. 217. *Vide infra*, p. 300.

(*p*) *Cf. Ireland v. Johnson*, (1834) 1 Bing. N. C. 162, at p. 167.

(*q*) *Cf. Attack v. Bramwell*, (1863) 3 B. & S. 520; *Tutton v. Darke*, (1860) 5 H. & N. 647. *Vide infra*, p. 114.

(*r*) 8 Edw. 7, c. 53, s. 2.

(*s*) *Cf. Attack v. Bramwell*, (1863) 3 B. & S. 520.

(*t*) Bullen on Distress (2nd ed.), at pp. 228, 236, and 279; cf. *Perring v. Emerson*, [1906] 1 K. B. 1.

(*u*) *Keen v. Priest*, (1859) 4 H. & N. 236; *Attack v. Bramwell*, *ubi supra*; cf. *Grunnell v. Welch*, [1906] 2 K. B. 555. As to computation of value, *vide supra*, p. 110.

(*x*) *Bayliss v. Fisher*, (1830) 7 Bing. 153.

If the distress levied be illegal as to a portion of the goods seized, it may none the less be valid as regards the remainder (*y*). In such cases, *e.g.*, where goods exempt from distress are included among those seized, damages can only be recovered in respect of those goods whose seizure was actually illegal (*z*).

It has been already mentioned that an action for conversion will lie in respect of goods illegally seized (*a*), but the measure of damages recoverable therein is more restricted than in an action for trespass (*b*).

Special or consequential damages.

Special damages are recoverable in an action for illegal distress, if not too remote, just as in actions of ordinary trespass or of replevin (*c*).

Restoration of goods to plaintiff.

If the goods have been restored, and the plaintiff has consented to receive them back, such fact may serve to mitigate the damages (*d*).

2 Will. & M. c. 5.
Double value.

In cases where a distress is made, by virtue of 2 Will. & M. sess. 1, c. 5, for rent pretended to be due and in arrear, and none is, in fact, due, the owner of the goods distrained may recover double the value of his goods, together with full costs (*e*). Full costs here means as between party and party (*f*).

A plaintiff cannot sue for double value, if he be a mere bailee (*g*); he must be the owner of the goods (*g*). Furthermore, double value is not recoverable, unless there be an actual sale of the goods (*h*).

Irregular Distress.

Irregular distress defined.

An irregular distress is a distress which is valid and legal in the first instance, but subsequently becomes illegal, by virtue of unlawful proceedings taking place in the carrying out of the levy. Thus, if a distrainer detains the goods distrained when a tender of rent and costs is made after distress and before impounding (*i*), or if he deals improperly with any overplus (*k*), or if he sells the goods without any appraisalment when an appraisalment is required (*l*), an irregular distress is committed.

(*y*) *Dod v. Monger*, (1704) 6 Mod. 215; *Harvey v. Pocock*, (1843) 11 M. & W. 740.

(*z*) *Harvey v. Pocock, ubi supra*; cf. *Bail v. Mellor*, (1850) 19 L. J. Ex. 279.

(*a*) *Vide supra*, pp. 105, 113; cf. *Swire v. Leach*, (1865) 11 M. & W. 479.

(*b*) *Vide supra*, p. 110.

(*c*) Cf. *Brewer v. Dew*, (1843) 11 M. & W. 625, at p. 630; *Smith v. Enright*, (1893) 69 L. T. 724, *per* Charles, J., at p. 725.

(*d*) *Edmondson v. Nuttall*, (1864) 17 C. B. N. S. 280, *per* Willes, J., at p. 294; cf. *Harvey v. Pocock, ubi supra*.

(*e*) (1689) 2 Will. & M. sess. 1, c. 5, s. 5; cf. *Masters v. Farris*, (1845) 1 C. B. 715; *Potter v. Bradley*, (1894) 10 T. L. R. 445.

(*f*) Cf. *Avery v. Wood*, [1891] 3 Ch. 115.

(*g*) Cf. *Chancellor v. Webster*, (1893) 9 T. L. R. 568.

(*h*) *Masters v. Farris, ubi supra*.

(*i*) *Loring v. Warburton*, (1858) E. B. & E. 507.

(*k*) Cf. *Lyon v. Tomkies*, (1836) 1 M. & W. 603.

(*l*) Cf. Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 5.

It is provided, by statute (*m*), that any goods distrained for rent, which have not been replevied within five days after the distress and notice thereof, may be sold for the best price that can be obtained, towards satisfaction of the rent. Statutory provisions.

But, it is to be observed that a landlord is not compelled to sell the goods which have been distrained, and no action is maintainable against him for failing to sell them (*n*); though, in the case of loose corn or hay (*o*), or of growing crops (*p*), which may, by statute, be distrained upon, it would appear that, in default of replevy, a subsequent sale, duly in accordance with the statutory provisions, must ensue (*q*).

It is now clearly established that a tender of the rent and of the expenses of the distress, made within the time allowed for replevying, even though the goods have been impounded, renders a subsequent sale irregular (*r*). If an action for irregular distress be brought under these circumstances, it is said to be founded upon the equity of the statute 2 Will. & M. sess. 1, c. 5, s. 2 (*r*). The tender may, and perhaps should, be made to the landlord himself (*s*). For instances of other circumstances which make a distress irregular the reader is referred to Bullen on Distress (2nd ed.).

No action for irregular distress can be maintained without proof of special damage resulting. Special damage requisite for cause of action.

If such proof of special damage be not forthcoming, the defendant is entitled to a verdict in his favour (*t*).

It is important to note that, at common law, no distinction was drawn between illegal and irregular distress, and any irregularity on the part of the distrainer, at any stage of the proceedings, might render him a trespasser *ab initio* (*u*).

It has, however, been enacted, by the Distress for Rent Act, 1737 (*x*), that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*; but the party grieved may recover satisfaction for the damage, and no more, in a special action of trespass, or on the case, at

(*m*) Distress Act, 1689 (2 Will. & M. c. 5), s. 1.; Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 10.

(*n*) *Philpott v. Lechain*, (1876) 35 L. T. 855.

(*o*) 2 Will. & M. c. 5, s. 3.

(*p*) 11 Geo. 2, c. 19, ss. 8 and 9.

(*q*) *Piggott v. Birtles*, (1836) 1 M. & W. 441, *per* Parke, B., at pp. 448 and 449.

(*r*) *Johnson v. Upham*, (1859) 2 E. & E. 250.

(*s*) *Smith v. Goodwin*, (1833) 4 B. & Ad. 413, at p. 417.

(*t*) *Rodgers v. Parker*, (1856) 18 C. B. 112; *Lucas v. Tarleton*, (1858) 3 H. & N. 116.

(*u*) Cf. *Six Carpenters' Case*, (1610) 8 Co. Rep. 146a; *Ireland v. Johnson*, (1834) 1 Bing. N. C. 162, at p. 165.

(*x*) 11 Geo. 2, c. 19, s. 19.

the election of the plaintiff. The same Act further provides (*y*) that no tenant shall recover in any action for irregular distress, if tender of adequate amends be made before action brought. A tender of amends relieves the landlord from any obligation to pay money into court (*z*). But a tender of amends, under this statute, affords no defence to an action against the landlord, in respect of a trespass committed by him which is in its nature wholly collateral to the distress, *e.g.*, an eviction of the tenant subsequent to the distress (*a*).

Purchase of
goods dis-
trained.

It may be observed that no action can be maintained against a purchaser of goods sold under a distress which is merely irregular, and not actually illegal, since the purchaser in such cases acquires a good title (*b*).

Measure of Damages.

The measure of damages recoverable for irregular distress is the amount of special damage proved.

It is to be observed that by the term special damage actual damage is meant, since it is, apparently, not strictly necessary for the plaintiff to specially plead the precise value of his goods (*c*). The fair value may be estimated at the trial upon the evidence adduced (*c*). General damages cannot be recovered.

Hence, ordinarily, the damages will consist of the full value of the goods distrained, less the amount of rent in arrear and the incidental charges (*d*).

Excessive Distress.

Excessive
distress
defined.

An excessive distress is one in the course of which the landlord acts in an oppressive manner, by seizing more goods than are reasonably required, in order to secure the rent and charges due to him.

Excessive distress is actionable both at common law and by statute (*e*). Formerly, however, it was necessary to sue for damages for trespass upon the case (*f*), except in certain exceptional instances in which the distress was so excessive as to be

(*y*) S. 20.

(*z*) *Jones v. Gooday*, (1842) 9 M. & W. 736.

(*a*) Cf. *Etherton v. Popplewell*, (1800) 1 East, 139.

(*b*) *Wallace v. King*, (1788) 1 Hy. Bl. 13; *Whitworth v. Smith*, (1832) 1 Moo. & R. 193.

(*c*) *Knotts v. Curtis*, (1832) 5 C. & P. 322; cf. *Smith v. Ashforth*, (1860) 29 L. J. Ex. 259.

(*d*) Cf. *Knotts v. Curtis*, *ubi supra*; *Biggins v. Goode*, (1832) 2 Cr. & J. 364; *Rocke v. Hills*, (1887) 3 T. L. R. 298; *Knight v. Egerton*, (1852) 7 Exch. 407; cf. also *Proudlove v. Twemlow*, (1833) 1 Cr. & M. 326; *Owen v. Legh*, (1820) 3 B. & Ald. 470. As to the amount of charges, *vide infra*, p. 117.

(*e*) 2 Co. Inst. 107; Statute of Marlbridge, 1267 (52 Hen. 3, c. 4); cf. *Crowder v. Self*, (1839) 12 Moo. & R. 190.

(*f*) Cf. *Lynne v. Moody*, (1729) 2 Stra. 851.

flagrantly unconscionable (*g*). In these latter instances the plaintiff could sue directly in trespass (*g*).

The amount of fees, charges, or expenses for levying a distress for rent, or for doing any act in relation thereto, is specified in the appendix annexed to the Rules made pursuant to the Law of Distress Amendment Act, 1888 (*h*), and no more than such amount is recoverable by the distrainer. The penalty, in cases where the rent demanded and due does not exceed 20*l.*, for taking charges in excess of the prescribed amount, or for taking expenses not genuinely incurred, is treble the amount unlawfully so taken, together with full costs; and such penalty is recoverable under a magistrate's summary jurisdiction (*i*).

Legitimate charges.

Treble penalty in cases of excessive charges where rent due is less than 20*l.*

It is to be observed that the charges set out in the Rules of 1888 supersede those contained in the schedule to the Distress (Costs) Act, 1817 (*k*); though the latter Act is not wholly repealed (*l*), and, in fact, its provisions apply—*exceptis excipendis*—to distresses for rates (*m*).

No action for excessive distress is maintainable, where the landlord has merely seized the one chattel available which would suffice to satisfy his claim, even though its value greatly exceed the amount of the claim (*n*), and even though there were other chattels available, if such other chattels did not amount, in their aggregate value, to the amount of the claim (*n*). But a distrainer is not entitled to seize chattels of greater value when he has the opportunity of seizing chattels of less value, which would suffice to satisfy his claim (*o*).

When cause of action is and is not maintainable.

No right of action accrues against a person who distrains for more rent than is actually due, provided the distress taken is not really excessive, having regard to the amount in fact due (*p*). So that the mere issuing of a distress, for a sum in excess of the rent due, is not, in itself, actionable, even though the act be prompted by malice (*q*).

A defendant may justify his distress upon any ground which existed at the time of the making of the distress, even though he did not base his claim thereon in the first instance (*r*).

No action can be maintained against a purchaser of goods sold

Purchase of goods distrained.

(*g*) *Hutchins v. Chambers*, (1758) 1 Burr. 579, *per* Lord Mansfield, at p. 590.

(*h*) 51 & 52 Vict. c. 21, s. 8; cf. [1888] W. N. pp. 439, 440, 563.

(*i*) Distress (Costs) Act, 1817 (57 Geo. 3, c. 93).

(*k*) *Walker v. Retter*, [1911] 1 K. B. 1103.

(*l*) Cf. *Lumsden v. Burnett*, [1898] 2 Q. B. 177.

(*m*) Cf. *Coster v. Headland*, [1906] A. C. 286.

(*n*) *Avenell v. Crocker*, (1828) Moo. & M. 172; *Field v. Mitchell*, (1807) 6 Esp. 71.

(*o*) *Roden v. Eylon*, (1848) 6 C. B. 427.

(*p*) *Tancred v. Leyland*, (1851) 16 Q. B. 669; *French v. Phillips*, (1856) 1 H. & N. 564; *Glynn v. Thomas*, (1856) 11 Exch. 870.

(*q*) *Stevenson v. Newnham*, (1853) 13 C. B. 285; cf. *Field v. Mitchell*, (1807) 6 Esp. 71.

(*r*) *Phillips v. Whitsed*, (1860) 29 L. J. Q. B. 164.

under an excessive distress, since the purchaser, in such cases, acquires a good title (*s*).

Measure of Damages.

The measure of damages recoverable for excessive distress is, ordinarily, the full value of the goods—if they have been sold—less the amount of rent and charges due to the landlord (*t*).

In estimating such value, regard must be had to the amount which the goods would probably realise, or have realised, in the open market (*u*), rather than to the amount which an incoming tenant might perhaps be willing to pay (*u*); since the defendant is not a trespasser *ab initio*, and the former amount represents the value for the purpose of satisfying the claim for rent. But the price realised at an auction is not necessarily conclusive of the value (*x*).

Special damage may be recovered but is not absolutely essential to cause of action.

Special damages may, in proper cases, be recovered over and above the value of the goods, if such damage be not too remote (*y*).

Even if no sale or removal of the plaintiff's goods has actually taken place, and the plaintiff prove no special damage, he is at least entitled to nominal damages for the inconvenience arising from the excessive levy (*z*).

If the tenant pay a certain sum to free himself from a distress levied in respect of an amount greater than the rent really due, he can recover such sum together with damages for the inconvenience suffered (*a*).

Fraudulent Removal of Goods.

If a tenant fraudulently remove from his premises goods or chattels, for the purpose of preventing the landlord from distraining them, the landlord or his agent may, within thirty days, seize such goods, wherever found, and sell them (*b*), provided they have not in the meantime been sold to a *bonâ fide* purchaser for value without notice (*c*).

Double value.

Furthermore, the tenant or his agent—if fraudulent (*d*)—may, under such circumstances, be compelled to pay, in an action

(*s*) Cf. *Whitworth v. Smith*, (1832) 5 C. & P. 250.

(*t*) *Wells v. Moody*, (1835) 7 C. & P. 59; cf., however, *Piggott v. Birtles*, (1836) 1 M. & W. 441, *per* Parke, B., at p. 451; cf. *Bail v. Mellor*, (1850) 19 L. J. Ex. 279.

(*u*) *Wells v. Moody*, *ubi supra*; *Rapley v. Taylor*, (1883) Cab. & El. 150, *per* Cave, J.

(*x*) *Smith v. Ashforth*, (1860) 29 L. J. Ex. 259.

(*y*) *Piggott v. Birtles*, (1836) 1 M. & W. 441; cf. *Grace v. Morgan*, (1836) 2 Bing. N. C. 534.

(*z*) *Chandler v. Doullton*, (1865) 3 H. & C. 553; cf. *Thompson v. Wood*, (1843) 4 Q. B. 493.

(*a*) *Fell v. Whittaker*, (1871) L. R. 7 Q. B. 120.

(*b*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 1.

(*c*) *Ibid.*, s. 2.

(*d*) Cf. *Brooke v. Noakes*, (1828) 8 B. & C. 537.

brought by the landlord, double the value of the goods(*e*). But the landlord cannot sue a third party for removing goods lodged in the tenant's premises (*f*).

Removal and Impounding of Cattle or Goods Distrained.

It is provided by the Statute of Marlbridge(*g*) that a distress must not be carried out of the county where it was made. It is further provided by 2 Ph. & M. c. 12, s. 1, that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is taken, except to a pound overt within the same shire, not above three miles distant from the place where such distress is taken; and that no other cattle or goods distrained, for any cause, at one time, shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of such distress; and that every person offending contrary to the Act shall forfeit to the party grieved, for every such offence, a hundred shillings and treble damages. Such damages would, presumably, comprise the additional expense and trouble entailed in replevying.

Penalty and
treble
damages.

It is to be observed that in accordance with the provisions of these two statutes the distress cannot be carried into another county, although it be to the nearest pound and within three miles from the place of distress(*h*). On the other hand, a distrainer of cattle damage feasant, or in fact of any cattle, may drive the distress to any pound within the hundred, although it be more than three miles from the place where the distress was taken(*i*).

Further, in cases coming within the purview of these statutes an action for trespass will not lie(*k*), since in the first instance the distress is lawful in itself.

Rescue and Pound Breach.

Rescue is the term applied to the taking of goods from the custody of a distrainer, after distress has been levied upon them, but before they have been impounded.

Rescue
defined.

Pound breach is the term applied to the retaking of goods from the custody of the distrainer or of the law—since a distrainer is vested with due legal as opposed to mere private rights—after such goods have been impounded.

Pound breach
defined.

(*e*) Distress for Rent Act, 1737, s. 3.

(*f*) *Tomlinson v. Consolidated Credit and Mortgage Corporation*, (1889) 24 Q. B. D. 135.

(*g*) 52 Hen. 3, c. 4.

(*h*) *Woodcroft v. Thompson*, (1682) 3 Lev. 48; *Gimbart v. Pelah*, (1748) Stra. 1272.

(*i*) *Coaker v. Willcocks*, [1911] 2 K. B. 124.

(*k*) *Woodcroft v. Thompson*, (1682) 3 Lev. 48; *Gimbart v. Pelah*, (1748) Stra. 1272.

Treble
damages
recoverable
by statute.

The landlord can sue for rescue or pound breach at common law, though an action will not lie for trespass or trover (*l*). But, if the action be brought under the Distress Act, 1689 (2 Will. & M. c. 5), s. 3, treble damages may be recovered against the defendant, who may be either the person actually guilty of the offence, or the owner of the distrained goods, if they have come into his possession (*m*). The landlord is entitled, in addition, to a full indemnity in respect of costs and expenses (*n*).

Landlord
must sue.

The plaintiff must be the landlord and not the bailiff, but the landlord can recover damages in respect of injuries sustained by the bailiff (*o*).

The action can be maintained without proof of special damage (*p*). Tender of the rent and costs prior to the offence being committed affords no defence (*q*).

Replevin.

Cause of
action.

At common law, the owner of goods which have been wrongfully distrained, seized under colour of distress or otherwise, by any person (other than a sheriff, or his officer, acting in execution of the process of a superior court) could recover his goods by giving sêcurité—in the form of a replevin bond—to the sheriff to prosecute an action of replevin against the seisor, and to return the goods if a return thereof should be adjudged.

Transfer of
powers from
sheriff to
registrar
under County
Courts Act,
1888.

It is now provided by the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 134—136, that the powers formerly vested in the sheriff, with regard to replevin, shall be transferred to the registrar of the court of the district, and that the action must be commenced within one month in the district county court, or within one week in the High Court. In the latter case, the plaintiff must prove, unless judgment be obtained by default, that he had good ground for believing, either that the title to some hereditament, the yearly rent or value whereof exceeded 20*l.*, or to some toll, market, fair, or franchise, was in question, or that such rent or damage, or the value of the goods seized, exceeded 20*l.*

Replevin
bond.

The security given under the replevin bond must cover the alleged rent and the probable costs of the action (*r*), and is conditional upon the plaintiff prosecuting his action with effect, *i.e.*, to a successful issue (*s*), and without delay, *i.e.*, with all due

(*l*) *R. v. Cotton*, (1751) 2 Vcs. Sen. 288, 294.

(*m*) *Cf. Berry v. Huckstable*, (1856) 14 Jur. 718.

(*n*) 1842 (5 & 6 Vict. c. 97), s. 2; *Gosling v. Bridgeman*, (1911) reported in *Times Newspaper*, 2nd Nov. 1911.

(*o*) *Alwayes v. Broome*, (1695) 2 Lut. 1259, 1263.

(*p*) *Kemp v. Christmas*, (1898) 79 L. T. 233.

(*q*) *Firth v. Purvis*, (1793) 5 T. R. 432.

(*r*) County Courts Act, 1888, ss. 135, 136.

(*s*) *Tummons v. Ogle*, (1856) 6 E. & B. 571.

diligence (*t*), within the period specified, and upon the plaintiff making a return of the goods, if a return thereof be adjudged (*u*).

No action for replevin can be maintained where the distress was lawful in the first instance (*x*). Thus, goods taken under a distress, which is merely irregular or excessive, cannot be recovered in replevin (*y*). Furthermore, articles such as fixtures (*z*), and other things which are wholly incapable of being distrained upon, *e.g.*, wild animals, and are not merely privileged from distress, cannot be recovered in replevin (*a*).

Conditions requisite for cause of action.

The plaintiff, in an action for replevin, must be the person entitled to the property in the goods (*b*), though a qualified ownership, such as that of a bailee or pledgee, will suffice (*c*). The defendant may be either the distrainer himself, or the person who appointed the distrainer as his agent (*d*), or both of them may be made co-defendants (*d*).

Who may sue.

Who may be sued.

A tenant may bring an action for replevin at any time prior to the sale of the goods by the distrainer (*e*), subject to the statutory limitation of six years (*f*). After a sale by the distrainer, the tenant's only remedies consist of actions for trespass, conversion, or detainue.

Time when action should be brought.

Measure of Damages.

The measure of damages recoverable in an action of replevin is, ordinarily, the costs of the replevin bond. But the plaintiff may recover general damages (*g*), or he may recover, as special damages, compensation for any loss or injury which he may have sustained by reason of the defendant's act, provided such loss or injury would not be deemed too remote in an action of trespass (*g*).

Further, if such special damages be not claimed in the action of replevin, they cannot form the basis of a subsequent action of trespass (*h*). Damages for trespass to land, however, cannot be recovered in an action of replevin (*h*), and such damages—if

Special damages.

(*t*) *Gent v. Cutts*, (1847) 11 Q. B. 288.

(*u*) Cf. Forms 287 and 288 to the County Court Rules, 1903.

(*x*) *Johnson v. Upham*, (1859) 28 L. J. Q. B. 252, *per* Lord Campbell, at p. 256; cf. *White v. Greenish*, (1861) 11 C. B. N. S. 209.

(*y*) Cf., however, *Evans v. Elliott*, (1836) 5 A. & E. 142.

(*z*) *Gibbs v. Cruikshank*, (1873) L. R. 8 C. P. 454.

(*a*) Cf. *Niblet v. Smith*, (1792) 4 T. R. 504; *Darby v. Harris*, (1841) 10 L. J. Q. B. 294, *per* Patteson, J., at p. 295.

(*b*) Cf. *Peacock v. Purvis*, (1820) 2 Brod. & B. 362.

(*c*) Co. Litt. 145b.

(*d*) Bullen on Distress (2nd ed.), at p. 279; cf. *Perring v. Emerson*, [1906] 1 K. B. 1.

(*e*) Cf. *Jacob v. King*, (1814) 5 Taunt. 451.

(*f*) 1623 (21 Jac. 1, c. 16), s. 3.

(*g*) *Gibbs v. Cruikshank*, (1873) L. R. 8 C. P. 454; *Smith v. Enright*, (1893) 69 L. T. 724.

(*h*) *Gibbs v. Cruikshank*, *ubi supra*.

sustained—can therefore give rise to a subsequent action arising out of the same act on the part of the defendant (*i*).

There would seem to be no reason why, in an action of replevin, the defendant should not, on his part, counterclaim for and recover moneys or damages—if any—due to him from the plaintiff.

(*i*) *Gibbs v. Cruikshank*, (1873) L. R. 8 C. P. 454.

CHAPTER V.

Contracts of Carriage.

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ACTIONS arising out of contracts of carriage are governed by the same general principles which apply to all contracts. Nevertheless, contracts of carriage present so many features of special application, that it is desirable to devote an entire chapter to the consideration of damages in relation to the carriage of goods and passengers by sea and land.

Damages may either accrue to the carrier or be recoverable against the carrier.

Damages Recoverable against a Carrier.

Goods or passengers may be transported from one place to another by any one who thereby constitutes himself a carrier.

Most contracts of carriage, however, are undertaken by "common carriers." A common carrier may be defined as one who holds himself out as being ready to transport for reward from one place to another the goods of all persons indifferently (*a*). He is under a liability to receive and carry for a reasonable price goods sent in response to his implied invitation (*b*). But, on the other hand, a common carrier, by professing only to carry a certain class of goods, or only to carry to and from certain specified places, may so restrict his business as to be liable as common carrier only in respect of particular goods and between certain places (*c*).

Common
carrier
defined.

It is a question of fact to be determined by the court whether in the case of any particular contract of carriage the carrier has or has not assumed the liabilities of a common carrier (*d*).

It is to be noted that, where goods which have been delivered to a common carrier are lost or injured, the owner of the goods is the proper person to sue for damages (*e*).

Who may sue.

(*a*) Cf. *Benett v. P. & O. Steamboat Co.*, (1848) 6 C. B. 775, *per* Wilde, C.J., at p. 787; cf. *Gisbourn v. Hurst*, (1709) 1 Salk. 249.

(*b*) *Nugent v. Smith*, (1875) 1 C. P. D. 19, *per* Brett, J., at p. 27; *Pickford v. Grand Junction Ry. Co.*, (1841) 8 M. & W. 372, *per* Parke, B., at p. 377.

(*c*) Cf. *Johnson v. Midland Ry. Co.*, (1849) 4 Exch. 367, *per* Parke, B., at p. 373; *Dickson v. G. N. Ry. Co.*, (1886) 18 Q. B. D. 176, *per* Lindley, L.J., at p. 183; *Brind v. Dale*, (1837) 8 C. & P. 207; *Oxlade v. N. E. Ry. Co.*, (1864) 15 C. B. N. S. 680.

(*d*) *Tamvaco & Co. v. Timothy and Green*, (1882) 1 Cab. & El. 1.

(*e*) *Fragano v. Long*, (1825) 4 B. & C. 219.

Hence, since, as a general rule, delivery of goods by a seller to a carrier, for conveyance to the buyer, places the goods at the risk of the consignee, the latter should be the plaintiff, in case of damage or loss to goods conveyed in fulfilment of a contract of sale (*f*).

But a consignor may, as bailee of goods, in certain cases, retain sufficient property in them to enable him to sue (*g*). Furthermore, where goods are sent for sale on approval, the consignor alone has a right of action against the carrier (*h*), since the consignor is the owner of the goods until after their delivery.

Liabilities of carrier.

Before dealing directly with the measure of damages (*vide infra*, p. 131) it is desirable briefly to consider the question of the liability attaching to a carrier.

A common carrier is deemed at common law to be an insurer of the safety of the goods committed to his charge (*i*), except in the case of loss or injury arising from—

- (1) The act of God (*k*).
- (2) The King's enemies (*l*).
- (3) Inherent vice of goods carried (*l*).
- (4) Contributory negligence on the part of the consignor (*m*).

Where, however, passengers are carried, not goods, the same degree of liability does not attach to the carrier (*n*).

The above liability of a common carrier has been to some extent restricted by statute.

Restrictive statutes.

The three most important restricting Acts are:

- (1) The Carriers Act, 1830.
- (2) The Railway and Canal Traffic Act, 1854.
- (3) The Merchant Shipping Act, 1894.

(1) Carriers Act, 1830.

The Carriers Act, 1830 (*o*) provides that no common carrier by land (*p*) shall be liable for the loss (*q*) of, or injury to, any article, or articles, or property, of certain specified descriptions, contained in any parcel or package (*r*) delivered to the carrier to be carried for hire, or to accompany the person of a passenger in a public

- (*f*) *Dunlop v. Lambert*, (1838) 6 Cl. & Fin. 600.
 (*g*) *Freeman v. Birch*, (1833) 3 Q. B. 492, n.; *Baxendale v. G. E. Ry. Co.*, (1869) L. R. 4 Q. B. 244; cf. *Crouch v. L. & N. W. Ry. Co.*, (1849) 2 C. & K. 789.
 (*h*) *Swain v. Shepherd*, (1832) 1 Moo. & R. 223.
 (*i*) *Nugent v. Smith*, (1875) 1 C. P. D. 19, *per* Brett, J., at p. 33.
 (*k*) *Forward v. Pittard*, (1785) 1 Term Rep. 27, *per* Lord Mansfield, at p. 33;
Riley v. Horne, (1828) 5 Bing. 217, *per* Best, C.J., at p. 220.
 (*l*) *Blower v. G. W. Ry. Co.*, (1872) L. R. 7 C. P. 655; cf. *Hutchinson v. Guion*, (1858) 5 C. B. N. S. 149.
 (*m*) *Barbour v. S. E. Ry. Co.*, (1876) 34 L. T. 67.
 (*n*) *Redhead v. Midland Ry. Co.*, (1869) 9 B. & S. 519; cf. *East Indian Ry. Co. v. Kalidas*, [1901] A. C. 396.
 (*o*) 11 Geo. 4 & 1 Will. 4, c. 68, s. 1.
 (*p*) As to carriage partly by sea and partly by land, *vide Le Conteur v. L. & S. W. Ry. Co.*, (1865) L. R. 1 Q. B. 54; cf. *Millen v. Brasch*, (1882) 10 Q. B. D. 142.
 (*q*) As to what constitutes "loss," cf. *Hearn v. L. & S. W. Ry. Co.*, (1855) 10 Exch. 793; *Millen v. Brasch*, *ubi supra*.
 (*r*) *Waite v. L. & Y. Ry. Co.*, (1874) L. R. 9 Exch. 67.

conveyance, where the value of such property contained in the package shall exceed 10*l.* (*s*), unless at the time of the delivery of the package at the office of the carrier, or to his servant (*t*), the value and nature of such article, articles, or property, shall have been declared (*u*) by the person delivering the package, and an increased charge, above the ordinary carriage, paid or agreed to be paid (*x*).

A carrier is entitled to demand such increased rate of charges, provided he affixes in a conspicuous part of his office, warehouse, or receiving house a legible (*y*) notice enumerating such increased charges (*z*). But, apart from a special contract, the common law liability of carriers for articles not enumerated in the above section remains and is unaffected by a mere notice (*a*).

The articles of property to which the Carriers Act, 1830, applies (*b*) comprise: gold and silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, all varieties of timepieces, trinkets (*c*), bills, bank notes, orders, notes, or securities for the payment of money (*d*), stamps, maps, writings, title deeds, paintings, engravings, pictures (*e*), gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs (*f*), and hand-made lace (*g*).

Articles to which the Carriers Act applies.

It is a question of fact—not of law—whether any particular article comes within the scope of the Carriers Act, 1830, s. 1 (*h*).

It is to be noted that a plaintiff who has dispatched a package containing some articles which are comprised in the above list, but who has failed to duly “declare” them, may, nevertheless, in case of loss of or injury to the package, recover damages in respect of other articles contained in the same package, which are not comprised in the above list (*i*).

Package containing articles to which the Act applies and articles to which it does not apply.

If the increased charge for carriage upon valuable goods be

(*s*) As to determination of value, *vide Blankensee v. L. & N. W. Ry. Co.*, (1882) 45 L. T. 761.

(*t*) Cf. *Hart v. Baxendale*, (1851) 6 Exch. 769.

(*u*) As to sufficiency of declaration, cf. *Bradbury v. Sutton*, (1872) 19 W. R. 800 ; 21 W. R. 128, Exch. ; *Hirschel v. G. E. Ry. Co.*, (1906) 12 Com. Cas. 11.

(*x*) Cf. *Behrens v. G. N. Ry. Co.*, (1861) 3 L. T. 863.

(*y*) *Clayton v. Hunt*, (1811) 3 Camp. 27.

(*z*) Cf. Carriers Act, 1830, s. 2 and s. 3, and also *Hart v. Baxendale*, (1851) 6 Exch. 769.

(*a*) Carriers Act, 1830, s. 4.

(*b*) *Vide* Carriers Act, 1830, s. 1.

(*c*) Cf. *Bernstein v. Baxendale*, (1859) 6 C. B. N. S. 251.

(*d*) Cf. *Stoessiger v. S. E. Ry. Co.*, (1854) 3 E. & B. 549 ; Chalmers on Bills of Exchange (7th ed.) at p. 55.

(*e*) Includes the picture-frame : *Henderson v. L. & N. W. Ry. Co.*, (1870) L. R. 5 Exch. 90.

(*f*) Does not include felt made partly of rabbits' fur : *Mayhew v. Nelson*, (1833) 6 C. & P. 58.

(*g*) Machine-made lace exempted by 28 & 29 Vict. c. 94.

(*h*) *Brunt v. Midland Ry. Co.*, (1864) 2 H. & C. 889.

(*i*) *Flowers v. S. E. Ry. Co.*, (1867) 16 L. T. 329.

Recovery of increased charge.

duly paid, in accordance with the Carriers Act, 1830, s. 2, the owner is entitled, in case of loss or injury, to recover as damages the amount so paid, together with the value of the goods lost or the amount of injury done (*k*).

Estoppel caused by declaration of value.

The consignor of any of the articles of value enumerated in the Carriers Act, s. 1, who has made a declaration as to the value of the articles dispatched, is estopped from claiming, in case of loss or injury, more than the amount declared (*l*), but the carrier may dispute the alleged value and compel the consignor to prove it in due form (*m*).

Act does not protect carrier in case of felony committed by his servant.

The Carriers Act, 1830, affords no protection to a carrier against liability for loss of or injury to any goods which may arise owing to the felonious acts of any of his servants (*n*). Similarly, a carrier's servant is not protected against personal liability in case of loss or injury accruing from his own misconduct or neglect (*n*).

The question of negligence is therefore immaterial in case of felony by the carrier's servant (*o*).

As to the requisite proof necessary to establish felony on the part of the carrier's servant, it may be observed that an unanswered *prima facie* case against an unidentified servant of the carrier will suffice (*p*).

But merely to show that under the circumstances it is perhaps more probable than not that a servant of the carrier was guilty of theft will not suffice even to make out a *prima facie* case (*q*), still less will loss of the goods suffice to prove theft (*r*).

Detention or temporary loss of goods.

The Carriers Act, 1830, will suffice not only to protect a carrier, under appropriate conditions as set out above, from liability for actual loss of goods, but also from liability for detention or temporary loss (*s*).

Modification of liabilities under the Act by special contract.

It is to be noted that the common law liability of a common carrier cannot be limited by any *public* notice (*t*) which the carrier may give or set up (*u*), and also that the fact of a common carrier receiving goods under a special contract does not necessarily deprive him of the protection of the Carriers Act, 1830 (*x*). If, however, the special contract is inconsistent with

(*k*) Carriers Act, 1830, s. 7.

(*l*) *M'Cance v. L. & N. W. Ry. Co.*, (1864) 3 H. & C. 343.

(*m*) Carriers Act, 1830, s. 9.

(*n*) Carriers Act, 1830, s. 8.

(*o*) *G. W. Ry. Co. v. Rimell*, (1857) 18 C. B. 575.

(*p*) Cf. *Vaughton v. L. & N. W. Ry. Co.*, (1874) L. R. 9 Exch. 93.

(*q*) *M'Queen v. G. W. Ry. Co.*, (1875) L. R. 10 Q. B. 569; *Metcalf v. L. B. & S. C. Ry. Co.*, (1858) 4 C. B. N. S. 307.

(*r*) *G. W. Ry. Co. v. Rimell*, (1857) 18 C. B. 575.

(*s*) *Millen v. Brasch*, (1882) 10 Q. B. D. 142.

(*t*) As to distinction between public notice and special contract, *vide G. N. Ry. Co. v. Morville*, (1852) 21 L. J. Q. B. 319; cf., however, *Railway and Canal Traffic Act*, 1854, s. 7.

(*u*) Carriers Act, 1830, s. 4.

(*x*) Cf. *Baxendale v. G. E. Ry. Co.*, (1869) L. R. 4 Q. B. 244.

the terms of the latter Act, the Act does not apply (*y*), except in so far as the Act and the contract are consistent (*z*). The Act does not apply if the terms of the contract are wholly inconsistent with the carrier's capacity of common carrier (*x*). As has already been seen, it is in each case a question of fact whether the liabilities of a common carrier do or do not attach to the carrier. (*Vide supra*, p. 125.)

It is to be noted, therefore, that, in spite of the Carriers Act, 1830, ss. 4 and 8, a carrier—other than a railway or canal company, as to whose liabilities *vide infra*—may enter into a special contract with a consignor varying his liability in whatever manner may be agreed upon. Such contract need not be in writing nor signed by the consignor (*a*), but its terms must be sufficiently brought to the notice of the consignor, so that, in the absence of express assent thereto on his part, assent may be implied (*b*).

A carrier may by special contract protect himself even against liability for the felonious acts of his servants (*c*), or against the grossest negligence, provided the contract be sufficiently explicit (*d*).

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, provides that a railway or canal company may enter into a valid special contract with a consignor of goods, provided that the contract is—

- (1) in writing;
- (2) signed by the consignor or person delivering goods for carriage;
- (3) reasonable and just in its conditions (*e*).

Nothing in the above Act is to alter or affect the rights and liabilities of the railway company under the Carriers Act, 1830, with respect to the articles mentioned in section 1 of the Carriers Act (section 7).

Any notice, conditions, or declaration, limiting the liability of a railway or canal company for loss or injury occasioned by its own, or its servants', neglect or default (*f*) is null and void except as hereinbefore set out (section 7).

(*y*) Carriers Act, 1830, s. 6.

(*z*) Cf. *Hirschel v. G. E. Ry. Co.*, (1906) 12 Com. Cas. 11.

(*a*) *Carr v. L. & Y. Ry. Co.*, (1852) 7 Exch. 707.

(*b*) *Harris v. G. W. Ry. Co.*, (1876) 1 Q. B. D. 515; *Richardson, Spence & Co. v. Rowntree*, [1894] A. C. 217.

(*c*) *Shaw v. G. W. Ry. Co.*, [1894] 1 Q. B. 373; cf., however, *Butt v. G. W. Ry. Co.*, (1851) 11 C. B. 140.

(*d*) *Baxter's Leather Co. v. R. M. S. Packet Co.*, [1908] 2 K. B. 626.

(*e*) The onus of proving that a condition limiting the common law liability of carriers is reasonable is thrown upon the company: cf. *Peek v. N. Staff. Ry. Co.*, (1862) 10 H. L. C. 473.

(*f*) This proviso does not include theft: *vide Shaw v. G. W. Ry. Co.*, [1894] 1 Q. B. 373. In fact, it has no bearing on loss apart from negligence: cf. *Duckham v. G. W. Ry. Co.*, (1899) 80 L. T. 774.

It is to be noted that the proviso as to the necessity of the consignor signing the special contract in accordance with section 7, as set out above, is intended to act merely as a protection to the consignor. The company cannot avail themselves of the plea of lack of such signature as is therein specified (*g*).

Carriage of
animals.

A railway or canal company is not liable beyond the sum of 50*l.* for loss of, or injury to, a horse, 15*l.* per head for cattle, 2*l.* per head for sheep or pigs, unless their value has been declared, in which case the company is entitled to demand a reasonable excess rate, provided that a notice of such increased charge be affixed in the station or office of the company (section 7).

The limitation of liability in the carriage of animals applies to everything incidental not only to the company's "forwarding and delivering," but also to its "receiving." Thus, where a valuable horse was injured through the negligence of the company's servants on the company's premises before the servant of the consignor had been able to make a declaration of value, it was held that the company was not liable beyond the extent of 50*l.* (*h*).

Application
of the Act.

Furthermore, the above provisions of section 7 only apply to a company's own lines. Therefore a company may accept goods on a "through" booking, and contract itself out of liability in respect of such goods in their transit on other lines, without the necessity of observing the formalities set out in section 7 (*i*). But section 7 may apply to contracts of carriage even wholly by sea, if by steamers owned by the railway company (*k*).

The necessity of observing the formalities set out in section 7 with regard to the limitation of a company's liability applies to all goods, including passengers' luggage (*l*) and animals (*m*). It does not, however, apply to anything which is not incidental to carriage. Thus, the statute has no bearing upon a contract for the deposit of goods in a railway cloak-room (*n*).

If a railway company which has received goods for carriage deal with them in a manner wholly inconsistent with the contract of carriage, it cannot avail itself of the exemption of liability under section 7 of the Act (*o*).

An agreement of carriage at "owner's risk" has no effect in depriving the railway company of liability for delay due to negligence (*p*). The "risk" refers only to the safety of the goods.

(*g*) *Baxendale v. G. E. Ry. Co.*, (1869) L. R. 4 Q. B. 244.

(*h*) *Hodgman v. West Midland Ry. Co.*, (1864) 5 B. & S. 173.

(*i*) *Zunz v. S. E. Ry. Co.*, (1869) L. R. 4 Q. B. 539.

(*k*) *Jenkins v. G. C. Ry. Co.*, (1911) 28 T. L. R. 61.

(*l*) *Cohen v. S. E. Ry. Co.*, (1877) 2 Ex. D. 253.

(*m*) *McManus v. L. & Y. Ry. Co.*, (1859) 4 H. & N. 327.

(*n*) *Van Toll v. S. E. Ry. Co.*, (1862) 12 C. B. N. S. 75.

(*o*) *Malet v. G. E. Ry. Co.*, [1899] 1 Q. B. 309; cf. *Foster v. G. W. Ry. Co.*, [1904] 2 K. B. 306.

(*p*) *D'Arc v. L. & N. W. Ry. Co.*, (1874) L. R. 9 C. P. 325.

A railway company is not bound to carry goods, other than passengers' luggage, by passenger train, but if it does, the provisions of section 7 as set out above apply (*q*).

A railway company acting as common carriers cannot in individual cases make terms in excess of their usual rate (*r*). If the consignor pay such excess amount he is entitled to recover it from the company.

Furthermore, it may be noted, in passing, that in cases where carriers refuse to enter into a contract of carriage in respect of goods which they are legally bound to carry, and do so from an ulterior motive, they may be mulcted in heavy damages (*s*).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502, re-enacting 17 & 18 Vict. c. 104, s. 503, provides that the owner of a British sea-going ship (*t*) shall not be liable to make good any loss or damage occurring without his actual fault or privity in the following cases, namely, (1) where any goods are lost or damaged by fire (*u*) on board the ship (*x*), or (2) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof (*y*).

(3) Merchant Shipping Act, 1894.

Section 503, which, more or less closely, follows section 54 of the Merchant Shipping Act Amendment Act, 1862, provides that owners—including, of course, railway companies (*z*)—of any ship, whether British or foreign, shall not be liable to damages beyond the sum of 15*l.* for each ton of the ship's tonnage in respect of loss of life or personal injury, or beyond the sum of 8*l.* for each ton of the ship's tonnage in respect of loss of or damage to goods or other vessels, where all or any of the following occurrences take place without the owner's actual fault or privity:—

- (1) Loss of life or personal injury is caused to any person carried in the ship.
- (2) Damage or loss is caused to any goods on board the ship.
- (3) Loss of life or personal injury is caused to any person carried in any other vessel by reason of improper navigation of the ship.

(*q*) *Wilkinson v. L. & Y. Ry. Co.*, [1907] 2 K. B. 222.

(*r*) Cf. *Crouch v. L. & N. W. Ry. Co.*, (1854) 14 C. B. 255; *Parker v. G. W. Ry. Co.*, (1844) 7 M. & Gr. 253; *Guernsey Mutual Transport Co. v. L. B. & S. C. Ry. Co.* (1908) 24 T. L. R. 318.

(*s*) Cf. *Crouch v. G. N. Ry. Co.*, (1856) 11 Ex. 742, *per* Martin, B., at p. 759.

(*t*) Cf. s. 742, M. S. Act, 1894; *The Gas Float Whitton (No. 2)*, [1897] A. C. 337.

(*u*) Includes smoke and also water used to put out the fire: *The Diamond*, [1906] P. 282.

(*z*) *Vide* *Morewood v. Pollok*, (1853) 1 E. & B. 743.

(*y*) Cf. *Acton v. Castle Mail Packets Co.*, (1895) 73 L. T. 158.

(*z*) *L. & S. W. Ry. Co. v. James*, (1872) 8 Ch. App. 241.

- (4) Damage or loss is caused to any other vessel or goods therein by reason of improper navigation of the ship.

The word "owner" as used in sections 502 and 503 above is deemed to include any charterer to whom the ship is demised (*a*).

Tonnage
defined.

The tonnage of a steamship is the registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage (*b*).

The tonnage of a sailing ship is declared by section 503 to be her registered tonnage.

Special provisions are made by section 503 with regard to the ascertainment of the tonnage of foreign ships.

The limitation of liability set out in section 503 of the above Act applies to passengers' luggage (*c*).

Section 503, sub-section 3, declares that the owner is liable for loss or damage arising on separate occasions, to the same extent as if no other loss or damage had accrued.

Compulsory
pilotage.

Section 633 of the Merchant Shipping Act, 1894, which re-enacts section 388 of the Merchant Shipping Act, 1854, provides that the owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified (*d*) pilot (*e*) acting in charge of that ship within any district where the employment of a qualified pilot is compulsory (*f*) by law.

This section does not apply to cases in which there is contributory fault on the part of the shipowner or his servants (*g*). Nor does it apply to cases in which the employment of a pilot is not compulsory (*h*).

Statutory
extensions of
the Merchant
Shipping Act,
1894.

The provisions of the above Act have been extended by two subsequent Acts.

The Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), provides that the liability of shipowners shall be limited as above, even during the period between the launching of a vessel and its registration, provided that such period shall not exceed three months.

The Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict. c. 32), provides that the limitations of liability set out in section 503 of the Merchant Shipping Act 1894, shall extend to loss or damage caused to property or rights of any kind, whether on land or on water.

(a) Merchant Shipping Act, 1906, s. 71.

(b) *Ibid.*, s. 69.

(c) *The Stella*, [1900] P. 161.

(d) Cf. *Stafford v. Dyer*, [1895] 1 Q. B. 566; *The Carl XV.*, [1892] P. 132, 324.

(e) Cf. M. S. Act, 1894, s. 742.

(f) M. S. Act, 1894, ss. 603, 605; cf. *The Ruby*, (1890) 15 P. D. 139, 164.

(g) *The Iona*, (1867) L. R. 1 P. C. 426; *Clyde Nav. Co. v. Barclay*, (1876) 1 App. Cas. 790; cf. *The Boucau*, [1909] P. 163; 25 T. L. R. 265.

(h) *The Lion*, (1869) L. R. 2 P. C. 525.

Notwithstanding the provisions of the above Acts, shipowners are liable to pay interest upon the amount of their liability from the date of injury done (*i*). They are also liable to pay, over and above the amount awarded as compensation for damage, the costs of proceedings, properly brought, in respect of the damage, since the latter constitute a separate personal liability (*k*). Interest.
Costs of proceedings.

Measure of Damages.

The measure of damages recoverable against a common carrier for total loss or destruction of goods entrusted to him is, generally, the value of the property lost (*l*) or destroyed (*m*). Loss or destruction.
(*Vide infra*.)

The measure of damages recoverable for injury caused by delay in the delivery of goods is such an amount as may fairly and reasonably be considered to represent the damage arising in the ordinary and usual course of things from the carrier's breach of duty. In other words, the damages for delay are such as may reasonably be supposed to have been in the contemplation of both parties, as a probable consequence of the delay in the circumstances within their common knowledge (*n*). Delay in transit.

The basis of calculation of the value of trade goods which have been lost or injured or delayed in delivery is, in general, the value of the goods at the place and time at which they ought to have been delivered (*o*). If at the time and place appointed for delivery there be a market price for such goods, the value will be determined by that price, and, under appropriate circumstances, it will be possible to recover damages for a fall in the market price (*p*). Formerly, it was considered that this rule only applied to contracts for carriage by land (*q*), and that damages for a fall in the market price of goods carried by sea were not recoverable (*q*). Estimation of value of goods.

It has, however, now been decided that no rule of law to this effect distinguishes contracts by land from those by sea (*r*), and

(*i*) *Smith v. Kirby*, (1875) 1 Q. B. D. 131.

(*k*) *The John Dunn*, (1840) 1 W. Rob. 159; *Ex parte Rayne*, (1841) 1 Q. B. 982.

(*l*) *Crouch v. L. & N. W. Ry. Co.*, (1849) 2 C. & K. 789; *Riley v. Horne*, (1828) 5 Bing. 217, 222.

(*m*) As to what damage constitutes "destruction," cf. *Dick v. East Coast Ry.*, (1901) 4 F. (Ct. of Sess.) 178.

(*n*) *Hadley v. Baxendale*, (1854) 9 Exch. 341; *Horne v. Midland Ry. Co.*, (1873) L. R. 8 C. P. 131; *Simpson v. L. & N. W. Ry. Co.*, (1876) 1 Q. B. D. 274; *Schulze v. G. E. Ry. Co.*, (1887) 19 Q. B. D. 30.

(*o*) *Rice v. Baxendale*, (1861) 7 H. & N. 96; *Rodocanachi v. Milburn*, (1887) 18 Q. B. D. 67.

(*p*) *Collard v. S. E. Ry. Co.*, (1861) 7 H. & N. 79; *Wilson v. L. & Y. Ry. Co.*, (1861) 9 C. B. N. S. 632; *Dunn v. Bucknall Bros.*, [1902] 2 K. B. 614; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301; cf., however, *Hawes & Son v. S. E. Ry. Co.*, (1884) 52 L. T. 514; *The Parana*, (1877) 2 P. D. 118.

(*q*) *The Parana*, (1877) 2 P. D. 118; *The Notting Hill*, (1884) 9 P. D. 105.

(*r*) *Dunn v. Bucknall Bros.*, [1902] 2 K. B. 614.

that where, at the time of the making of the contract, both parties contemplated that the time of arrival of the goods was an essential factor in the contract, it would be immaterial whether the transit was by land or sea (*r*). If there be no market price, the value may be estimated as comprising—

- (1) the cost price of the goods;
- (2) expenses of carriage;
- (3) possibly—reasonable profits (*s*).

Where, however, special circumstances are brought to the knowledge of the carrier with regard to the purpose for which the goods have been consigned, so that the purpose may fairly be taken to have been in the contemplation of the carrier (*t*), such damages may be recovered as are naturally consequent upon the failure of that purpose (*u*).

Physical
deterioration
of goods.

Damages may be recovered in respect of loss due to physical deterioration or wasting of goods, in cases where such loss may be regarded as an ordinary probable consequence of delay (*x*).

Where, however, the deterioration has been the result of some specially sensitive condition of the goods, which has not been brought to the notice of the carrier, damages cannot be recovered in respect of such loss (*y*).

Special cir-
cumstances
affecting
value of
goods.

Two very instructive cases, already referred to in the footnotes, with regard to the measure of damages recoverable for delay in the carriage of goods are *Wilson v. L. & Y. Ry. Co.* (*z*) and *Schulze v. G. E. Ry. Co.* (*a*). Both these cases have recently been approved by the House of Lords (*b*). The principle deducible from these cases seems to be that while, as stated below, special profits are not recoverable unless the carrier has been clearly apprised with regard to them, and has undertaken obligation in respect of them, nevertheless, since, in general, a carrier is liable, in case of delay in delivery, to pay the difference between the value of the goods to the sender at the date when they should have been delivered and the value upon their actual date of delivery, the court may, in assessing such difference in value, in the case of goods not readily procurable in the market, take into account any special factors concerning the nature of the goods and their use, which have been brought to the notice of the carrier (*c*).

(*r*) *Dunn v. Bucknall Bros.*, [1912] 2 K. B. 614.

(*s*) *O'Hanlon v. G. W. Ry. Co.*, (1865) 6 B. & S. 484.

(*t*) Cf. *Candy v. Midland Ry. Co.*, (1878) 38 L. T. 226.

(*u*) *Simpson v. L. & N. W. Ry. Co.*, (1876) 1 Q. B. D. 274, *per* Cockburn, C.J., at p. 277; *Schulze v. G. E. Ry. Co.*, (1887) 19 Q. B. D. 30; cf. *The Parana*, (1877) 2 P. D. 118.

(*x*) *The Parana*, (1877) 1 P. D. 452; 2 P. D. 118; *Hawes v. S. E. Ry. Co.*, (1884) 54 L. J. Q. B. 174.

(*y*) *Baldwin v. L. C. & D. Ry. Co.*, (1882) 9 Q. B. D. 582.

(*z*) (1861) 9 C. B. N. S. 632.

(*a*) (1887) 19 Q. B. D. 30.

(*b*) Cf. *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, at p. 308.

(*c*) See also *Jameson v. Midland Ry. Co.* (1884) 50 L. T. 426; *Cooke v. Midland Ry. Co.*, (1892) 57 J. P. 388.

Loss of special profits cannot, in the absence of special circumstances brought duly to the notice of the carrier, be regarded as an ordinary consequence of delay. Such profits are, therefore, usually not recoverable (*d*).

Loss of special profits.

Reasonable expenses incurred in inquiring and searching for goods, which are delayed, are usually recoverable (*e*). Such expenses, however, do not comprise the cost of staying at an hotel pending the arrival of the goods (*f*).

Expenses incurred in searching for delayed goods.

Compensation will not be allowed for losses which the plaintiff might, with the exercise of reasonable prudence, have avoided (*g*). In fact, in the assessment of damages for loss, injury, or delay, it is a very material consideration whether the plaintiff has acted with sufficient diligence to mitigate resulting loss (*h*).

Mitigation of loss by plaintiff.

Hence, expenses or loss prudently incurred in mitigating ultimate loss may be recovered (*i*).

Furthermore, the carrier, on his part, is under an obligation to mitigate, as far as he reasonably can, any loss or damage arising even from causes for which he cannot be held responsible. If he fail in performing such obligation he may be mulcted in respect of such secondary preventable loss or damage (*k*).

Carrier's obligation to safeguard interests of consignor.

A consignor who is liable to a third party for damages for delay in delivery may recover such damages from a defaulting carrier, provided the latter was duly informed of and accepted the consignor's obligation before he undertook the carriage of the goods (*l*). The consignor may also recover the costs of defending an action brought against him, provided he was justified in defending such action (*m*).

Damages incurred to third party by consignor.

Damages may be recovered against a carrier not only as above for loss or injury or delay in transit, but also for total failure to carry goods or passengers in accordance with the contract of carriage.

Total failure to carry.

(*d*) *Hadley v. Baxendale*, (1854) 9 Exch. 341; *Gee v. L. & Y. Ry. Co.*, (1860) 6 H. & N. 211; *G. W. Ry. Co. v. Redmayne*, (1866) L. R. 1 C. P. 329; *Horne v. Midland Ry. Co.*, (1873) L. R. 8 C. P. 131; *Den of Ogil Co., Ltd. v. Caledonian Ry. Co.*, (1902) 5 F. 99 (Ct. of Sess.); *British Columbia Sawmill Co., Ltd. v. Nettleship*, (1868) L. R. 3 C. P. 499; cf. *Collard v. S. E. Ry. Co.*, (1861) 7 H. & N. 79; *Wilson v. L. & Y. Ry. Co.*, (1861) 9 C. B. N. S. 632; *Dunn v. Bucknall Bros.*, [1902] 2 K. B. 614.

(*e*) *Hales v. L. & N. W. Ry. Co.*, (1863) 4 B. & S. 66.

(*f*) *Woodger v. G. W. Ry. Co.*, (1867) L. R. 2 C. P. 318; cf. *Candy v. Midland Ry. Co.*, (1878) 38 L. T. 226.

(*g*) *The Blenheim*, (1885) 10 P. D. 167. *Vide supra*, p. 13.

(*h*) *Irvine v. Midland G. W. Ry. Co.*, (1880) 6 L. R. Ir. 55; *Davis v. L. & N. W. Ry. Co.*, (1858) 4 Jur. N. S. 1303.

(*i*) Cf. *The Minnetonka*, [1905] P. 206; 21 T. L. R. 407; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105, at p. 117; *British Westinghouse Electric Co. v. Underground Electric Ry. Co.*, [1912] W. N. 212.

(*k*) *Notara v. Henderson*, (1872) L. R. 7 Q. B. 225; *Hayn v. Culliford*, (1879) 4 C. P. D. 182.

(*l*) Cf. *Grébert-Borgnis v. Nugent*, (1885) 15 Q. B. D. 85.

(*m*) *Hammond v. Bussey*, (1887) 20 Q. B. D. 79; *Agius v. G. W. Colliery Co.*, [1899] 1 Q. B. 413; cf. *Baxendale v. L. C. & D. Ry. Co.*, (1874) L. R. 10 Exch. 35. *Vide infra*, Ch. 12, s. 3.

Substituted
mode of
conveyance.

The party who has contracted with the defaulting carrier is entitled, in case of such failure to carry goods as agreed, to recover such damages as constitute a necessary and immediate consequence of the injury sustained (*n*). Thus, damages for depreciation of goods may be recovered where no alternative means of conveyance was available (*o*), as in the case of delay in transit (*p*). If, on the other hand, the freighter or consignor, in order to mitigate his loss, obtain another ship or mode of conveyance, he may recover as damages the extra expense to which he may have been put by so doing (*q*).

But the substituted mode of conveyance must not be of an imprudent and extravagant character (*r*).

Where goods are kept waiting for shipment in consequence of default on the part of the shipowner or carrier, the cost of warehousing or otherwise preserving the goods can be recovered as an ordinary consequence of the breach. Such cost may, in fact, be deemed to constitute part of the extra cost of the substituted mode of carriage.

No alterna-
tive means of
conveyance
available.

The true measure of damages, in cases where the freighter or consignor of goods is unable to procure other means of carriage, is the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods at the place of shipment and the amount of the freight and insurance (*s*).

The questions as to remoteness of damage are identical, whether they arise in cases of total failure to carry, or delay in carrying, or injury to, in the course of carrying, goods (*t*).

Failure to
carry
passengers.

The measure of damages in cases where a carrier contracts to carry passengers and fails to duly perform his contract is the expense incurred by the passengers in obtaining a substituted mode of conveyance, together with other reasonable and necessary expenses entailed by the carrier's default (*u*). Thus, hotel expenses involved by the delay may be recovered (*u*).

Incon-
venience.

Damages in respect of personal inconvenience may be recovered in cases where such inconvenience is "sufficiently serious" (*x*).

But damages other than those naturally and directly resulting

(*n*) Cf. *Walton v. Fothergill*, (1835) 7 C. & P. 394.

(*o*) *Waller v. Midland G. W. of Ireland Ry. Co.*, (1879) 4 L. R. Ir. 376.

(*p*) *Vide supra*, pp. 132 *et seq.*

(*q*) *Featherston v. Wilkinson*, (1873) L. R. 8 Ex. 122; *Irvine v. Midland G. W. of Ireland Ry. Co.*, (1879) 6 L. R. Ir. 55; cf. *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105, at p. 117; *British Westinghouse Electric Co. v. Underground Electric Ry. Co.*, [1912] W. N. 212. *Vide supra*, p. 133.

(*r*) *Le Blanche v. L. & N. W. Ry. Co.*, (1876) 1 C. P. D. 286.

(*s*) *Stroms Brüks Aktie Bolag v. Hutchison*, [1905] A. C. 515.

(*t*) *Vide supra*, pp. 131 *et seq.*

(*u*) *Cranston v. Marshall*, (1850) 5 Ex. 395; cf. *Le Blanche v. L. & N. W. Ry. Co.*, (1876) 1 C. P. D. 186; *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408.

(*x*) *Hobbs v. L. & S. W. Ry. Co.*, (1875) L. R. 10 Q. B. 111, *per Cockburn, C.J.*, at p. 117; cf. however, *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408.

from the breach of contract will be deemed too remote(y). Thus, apart from cases arising out of special contracts in which sufficient and express notice of special conditions is given to the carrier(z), damages cannot be recovered in respect of loss of appointment caused by delay, or injury to health, or mental distress(y).

Loss of appointment, etc.

It should be noted that the publication of time-tables by a railway company amounts to a promise that the trains therein advertised will in fact run, subject to the terms and conditions stated, whether such trains do or do not belong to the railway company(a). If the conditions as advertised are not fulfilled, the company may incur liability even to a party who has not actually purchased a ticket(b).

Implication arising from publication of time-tables.

Damages may be recovered from a carrier for delivering wrong goods, if the loss incurred be the natural result of such wrong delivery. But if the action lies in tort and does not arise from breach of contract, the circumstances must be such as to definitely imply an unmistakable duty on the part of the carrier to take care(c).

Delivery of wrong goods by carrier.

Damages recoverable by a Carrier.

Where goods have been delivered by a carrier in accordance with a contract of carriage, the party liable for the amount of the carriage is, naturally, the person with whom the contract was made. But, the particular person with whom the contract was, in effect, made, is a question of fact to be determined in each case(d).

Who may be sued.

On the one hand, it may be said that, if goods are delivered to a carrier by the consignor by order of the consignee, the consignee is liable, since the consignor merely acts as agent(e).

On the other hand, unless the consignor gives sufficient notice to the carrier that he is merely acting as agent, the consignor will remain liable for the amount of carriage or freight(f).

No action can be maintained for freight or carriage until the carrier has duly performed his part of the contract. Thus, if goods have actually been entrusted to the carrier, the latter

When carrier may sue.

(y) *Hobbs v. L. & S. W. Ry. Co.*, (1875) L. R. 10 Q. B. 111; *Hamlin v. G. W. Ry. Co.*, (1856) 1 H. & N. 408; cf. *Walton v. Fothergill*, (1835) 7 C. & P. 394, per Tindal, C.J., at p. 396. *Vide supra*, p. 13.

(z) Cf. *Cooke v. Midland Ry. Co.*, (1892) 57 J. P. 388.

(a) *Denton v. G. N. Ry. Co.*, (1856) 5 E. & B. 860; cf., however, *Le Blanche v. L. & N. W. Ry. Co.*, (1876) 1 C. P. D. 286.

(b) *Denton v. G. N. Ry. Co.*, *ubi supra*; cf. *Cooke v. Midland Ry. Co.* (1892) 57 J. P. 388.

(c) *Cunnington v. G. N. Ry. Co.*, (1883) 49 L. T. 392, per Brett, M.R., and Fry, L.J., at pp. 393 and 394; cf. *Fargrove Steam and Navigation Co. v. G. W. Ry. Co.*, *Times Newspaper*, 22nd Dec., 1910.

(d) Cf. *G. W. Ry. Co. v. Bagge*, (1885) 15 Q. B. D. 625.

(e) *Dawes v. Peck*, (1799) 8 Term Rep. 330.

(f) *Fox v. Nott*, (1861) 6 H. & N. 630.

cannot sue until he has carried the goods and been ready and willing to deliver them (*g*).

Recovery of
cost of
carriage or
freight.

Where there is an express agreement for the carriage of goods by land or sea at a fixed rate, the amount of damages recoverable by the carrier upon performance of the contract is naturally the amount previously agreed upon.

Methods of
calculation
of freight.

In calculating the freight payable upon the shipment and carriage of goods by sea, the quantities of goods carried as stated in the bill of lading are not necessarily conclusive. Either party may, generally, show that there has been a mistake in the statement (*h*). If, however, the freight is expressly to be paid upon the quantity as stated in the bill of lading, it is not open to either party, in the absence of fraud, to vary the amount by showing that the statement was not correct (*i*).

In the absence of agreement, or of a uniform custom to the contrary, the rule is, that if the weights or measurements at the loading port and the port of delivery differ, the lowest weight or measurement is to be taken in calculating the freight (*k*).

If, therefore, the cargo swell on the voyage, the freight is payable on the quantity as shipped (*l*); if it has shrunk or wasted by drainage or evaporation, the quantity is deemed to be the amount actually delivered (*m*).

In absence of
express
contract
carrier
entitled to
reasonable
sum.

If no agreement has been entered into with regard to the amount to be paid for carriage, the carrier can only recover a reasonable sum (*n*).

It would appear that a carrier can reasonably claim a higher charge for the greater risk attendant upon the carriage of more valuable goods (*o*).

Damages
recoverable
against a
charterer.

The measure of damages recoverable by a shipowner for failure on the part of the charterer to ship goods, as agreed, is the difference between the freights which he would have received had the goods been properly shipped and the freights which become payable on what has, in fact, been shipped by the freighter (*p*), or by others in his stead, deducting, on the one hand, the expenses which the shipowner avoids by not having to take on board, carry, and discharge the cargo not shipped (*q*),

(*g*) *Barnes v. Marshall*, (1852) 18 Q. B. 785.

(*h*) *Brown v. Powell Coal Co.*, (1875) L. R. 10 C. P. 562; *McLean v. Fleming*, (1871) L. R. 2 H. L. (Sc.) 128; cf. *Moller v. Living*, (1811) 4 Taunt. 102.

(*i*) *Tully v. Terry*, (1873) L. R. 8 C. P. 679; cf. *Blanchet v. Powell's Colliery Co.*, (1874) L. R. 9 Ex. 74.

(*k*) *Gibson v. Sturge*, (1855) 10 Ex. 622.

(*l*) *Gibson v. Sturge*, *ubi supra*; *Buckle v. Knoop*, (1867) L. R. 2 Ex. 333.

(*m*) *Abbott on Shipping* (14th ed.), at p. 705; but cf. *Dakin v. Oxley*, (1864) 15 C. B. N. S. 646, *per* Willes, J., at pp. 665 and 666.

(*n*) *Harris v. Packwood*, (1810) 3 Taunt. 264, *per* Lawrence, J., at p. 272.

(*o*) *Harris v. Packwood*, (1810) 3 Taunt. 264; cf. Carriers Act, 1830, ss. 2 and 3, and also *Hart v. Baxendale*, (1851) 6 Exch. 769.

(*p*) *Cp. Hunter v. Fry*, (1819) 2 B. & Ald. 421, *per* Abbott, C.J., at p. 425; *Aitken v. Ernsthause*, [1894] 1 Q. B. 773.

(*q*) Cf. *Morris v. Levison*, (1876) 1 C. P. D. 155, *per* Brett, J., at p. 158.

and, on the other hand, adding any extra expenses which the shipowner has prudently incurred in obtaining and carrying the substituted cargo (*r*).

The shipowner or captain would, in fact, appear to be under a duty to make all reasonable endeavours to reduce the damages accruing from the charterer's failure to load, and he should obtain substituted freight if he can (*s*).

But where an entire ship has been engaged, or a conveyance hired, for the carriage of goods at a lump sum, the carrier is entitled to claim such sum without deduction, whether the ship or conveyance be completely filled or not (*t*).

In estimating the damages recoverable by the shipowner, the freight earned upon substituted cargo must accordingly be taken into account. Hence, if such freight amount to such a sum as would have been earned under the original charterparty, after bringing in all expenses, the damages will be merely nominal (*u*).

The amount of damages recoverable for breach of a charterparty or bill of lading may be specified in the contract. Thus, there may be a stipulated sum payable for each day's detention of the ship, or for each day's delay in delivering the goods, or a fixed dead freight may be payable for each ton short-shipped.

But a penalty clause for non-performance of the contract would appear to be practically nugatory (*x*). Moreover, an agreement to pay a stipulated sum as damages may be rendered void by non-fulfilment of precedent conditions set out in the contract (*y*).

Where a ship is chartered to carry a cargo of enumerated articles at specified rates of freight, the rule for estimating damages, in case of failure to provide the stipulated cargo, is to calculate the freight which would have been earned had average quantities of all the enumerated articles been shipped (*z*).

Disputes frequently arise in cases where the clauses of the charterparty permit of alternative forms of cargo being loaded (*a*).

Disputes also may arise as to whether the amount of cargo

(*r*) *Vide supra*, p. 133.

(*s*) *Wilson v. Hicks*, (1857) 26 L. J. Ex. 242; cf. *Lodge Holes Colliery Co. v. Wednesbury Corporation*, [1908] A. C. 323, *per* Lord Chancellor, at p. 326; cf., however, *Smith v. McGuire*, (1858) 27 L. J. Ex. 465, *per* Martin, B., at p. 472. *Vide supra*, p. 13.

(*t*) *Cf. Mackill v. Wright*, (1888) 14 App. Cas. 106.

(*u*) *Staniforth v. Lyall*, (1830) 7 Bing. 169; *Puller v. Staniforth*, (1809) 11 East, 232; cf. *Bell v. Puller*, (1810) 2 Taunt. 285; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105.

(*x*) *Harrison v. Wright*, (1811) 13 East, 343; *Stroms Brüks Aktie Bolag v. Hutchison*, [1905] A. C. 515, at p. 522; cf., however, *Dimech v. Corlett*, (1858) 12 Moo. P. C. 199.

(*y*) *Staniforth v. Lyall*, (1830) 7 Bing. 169.

(*z*) *Capper v. Forster*, (1837) 3 Bing. N. C. 938; cf. *Thomas v. Clarke*, (1818) 2 Stark. 450; *Warren v. Peabody*, (1849) 8 C. B. 800.

(*a*) *Cf. Moorsom v. Page*, (1814) 4 Camp. 103.

actually shipped is equivalent to the amount of cargo specified in the charterparty (*b*).

It would, however, be beyond the scope of this book to deal with the interpretation of such clauses (*c*). Suffice it to say that evidence of usage or custom may be adduced with regard to loading (*d*).

Liability for
the dispatch
of dangerous
goods.

A shipper or consignor of goods of a dangerous character is bound to take reasonable care that their dangerous nature is communicated to the shipowner or carrier (*e*). Failure to perform this duty will render the party in default liable for all probable consequences of such default (*e*).

Such consequences would comprise damage done to other goods packed in the same ship or conveyance, and personal injuries sustained through lack of knowledge of the dangerous character of the goods carried (*f*).

But there would seem to be great doubt as to whether damages can be recovered in cases where the shipper or consignor is himself ignorant of the dangerous character of the goods (*g*). Furthermore, where the carrier has an opportunity of examining the goods, the shipper's responsibility is correspondingly diminished (*h*).

Statutory
provisions.

By the Merchant Shipping Act, 1894, ss. 446—448, it is enacted that dangerous goods must be properly "declared" by the shipper under penalty of a fine, and that the carrier may refuse to accept such goods for carriage. The Explosives Act, 1875 (38 Vict. c. 17), enacts similar provisions with regard to the carriage of certain dangerous goods by land.

(*b*) *Cockburn v. Alexander*, (1848) 6 C. B. 791; cf. *Morris v. Levison*, (1876) 1 C. P. D. 155; *Miller v. Borner*, [1900] 1 Q. B. 691.

(*c*) *Vide* Carver's *Carriage by Sea* (5th ed.), Chap. IX.

(*d*) *Cuthbert v. Cumming*, (1855) 11 Ex. 405.

(*e*) *Farrant v. Barnes*, (1862) 11 C. B. N. S. 553; *Brass v. Maitland*, (1856) 6 E. & B. 470.

(*f*) *Ibid.*

(*g*) *Brass v. Maitland*, *ubi supra*, per Crompton, J., at pp. 488 *et seq.*; *Williams v. East India Co.*, (1802) 3 East, 192.

(*h*) *Acatos v. Burns*, (1878) 3 Ex. D. 282; cf. *Hutchinson v. Guion*, (1858) 5 C. B. N. S. 149; *Fargrove Steam and Navigation Co. v. G. W. Ry. Co.*, (1910) *coram* Scrutton, J., reported *Times* Newspaper, 22nd Dec., 1910.

CHAPTER VI.

Section I.—Work and Labour.

„ II.—Contracts of Hiring and Service.

In previous chapters, the law of damages in regard to contracts for the sale of real and personal property has been dealt with. In this chapter, contracts for the sale of work and labour, and contracts of hiring and service, whereby personal service for a variable period of time is purchased, will be considered.

SECTION I.

Work and Labour.

Where a contract is entered into for the execution of a certain piece of work, and such contract is broken either (1) by the work not being performed within the specified time, or, if no time be specified, within a reasonable time, or (2) by the work being improperly executed, the measure of damages is the loss directly sustained (1) by the delay, or (2) by the improper workmanship.

In illustration of what loss is regarded as being direct in such cases, it may be mentioned that where a chattel is left for repair and is detained beyond the stipulated time “the measure of damages for the delay is, *primâ facie*, the sum which would have been earned in the ordinary course of employment of the chattel in the time” (a).

Similarly, where the work, although completed, is improperly executed, and the subject-matter is thereby rendered temporarily useless, the owner may recover damages in respect of loss sustained during the detention requisite for the purpose of repairing the chattel (b).

In estimating such damages, the actual profits accruable under specific sub-contracts do not in themselves constitute the true basis of calculation, but such sub-contracts may be considered in arriving at the amount (c).

Payment for Work and Labour Expended.

Where a contract has been entered into for the performance of work, and such work has been duly performed in accordance with

(a) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.*, (1868) 4 Ch. App. 112, *per* Lord Chancellor, at p. 117; cf. *Smeed v. Foord*, (1859) 1 E. & E. 602.

(b) *Wilson v. General Iron Screw Collier Co.*, (1877) 47 L. J. Q. B. 239.

(c) Cf. *Waters v. Towers*, (1853) 8 Exch. 401; *De Mattos v. G. E. Steamship Co.* (1885) Cab. & El. 489; *Marcus v. Myers* (1895) 11 T. L. R. 327.

the terms of the contract, the measure of damages, upon default as to payment on the defendant's part, is either the remuneration fixed by the contract, or, if the contract be silent as to price, a just and reasonable remuneration for the work and labour expended (*d*). Where the contract provides for the manufacture of a chattel out of materials supplied by the workman, the transaction may in form be one for the sale of a chattel (*e*), in which case the workman may recover the contract price, or, if none be fixed, the value of the chattel.

Where a contract is entered into for the construction of a machine whose construction requires skill and various appliances, the plaintiff can recover, in an action for work, labour, and materials, such sum as represents the cost of the materials and labour, a fair remuneration for the skill and inventiveness exercised, and, in addition, adequate compensation for the monopolisation of appliances which might have been put to other use (*f*).

Suing under
a *quantum*
meruit.

Where there is a contract for the execution of work, which is an entire, as opposed to a divisible, contract (*g*), and the work has not been completed in its entirety, the plaintiff can—speaking generally—only demand payment on a *quantum meruit* under two sets of circumstances :

- (1) Where the defendant has absolutely refused to perform, or has incapacitated himself from performing, his part of the contract, and has thereby prevented the plaintiff from fulfilling his part of the contract (*h*).
- (2) Where the plaintiff has done work under a special contract, though not in strict accordance with its terms, and the defendant has derived a benefit, from the work done, under such circumstances as to raise an implied promise to pay for it.

Building
“extras.”

Instances of this latter kind frequently occur in connection with building contracts when “extras” are executed by the workman or builder. The rule as to the workman's payment for “extras” entailed by a deviation from the original contract, by the consent of both parties, is that the original contract is to be followed so far as it can be traced, but if it has been totally abandoned, then the workman may charge for his work according to its value, as if the original contract had never been made (*i*).

(*d*) *Prickett v. Badger*, (1856) 1 C. B. N. S. 296.

(*e*) Cf. *Lee v. Griffin*, (1861) 1 B. & S. 272; *Clay v. Yates*, (1856) 1 H. & N. 73; *Isaacs v. Hardy*, (1884) 1 C. & E. 287.

(*f*) *Grafton v. Armitage*, (1845) 2 C. B. 336; *Bird v. McGahey*, (1849) 2 C. & K. 707.

(*g*) Cf. *Roberts v. Havelock*, (1832) 3 B. & Ad. 404.

(*h*) *Planché v. Colburn*, (1831) 8 Bing. 14; cf. *Prickett v. Badger*, (1856) 1 C. B. N. S. 296; cf. also *O'Neil v. Armstrong*, [1895] 2 Q. B. 418; *Bower v. Chapel-en-le Frith Rural Council*, (1911) 75 J. P. 122, 321. *Vide infra*, p. 144.

(*i*) *Pepper v. Burland*, (1792) Peake, 139; *Robson v. Godfrey*, (1816) 1 Stark. 725.

In a case of "extras" arising out of the performance of a building contract, the builder or workman may sue in respect of the "extras" before the time fixed for payment in the original contract has arrived (*k*). On the other hand, the employer, in spite of his assent to deviation from the terms of the original contract, cannot be made liable beyond the amount originally stipulated, unless he was informed, or must necessarily have been aware, that additional expense would be incurred by the deviation (*l*). Nor can any promise to pay be implied in cases where the employer has no option of rejection (*e.g.*, buildings on employer's own land) (*m*).

Apart from the two sets of circumstances mentioned above, the employer cannot be called upon to pay remuneration or damages for work incompletely done, or not done in accordance with the terms of the contract, even though he derive benefit therefrom (*n*).

Completion of contract a necessary condition precedent to plaintiff's cause of action.

Thus, a workman who contracted to mend several chandeliers for a lump sum, and repaired some but not all of them, was unable to recover any damages whatever from the employer who commissioned him (*o*).

Again, where a workman without authority executed some "extras" beneficial to his employer, he could not recover any remuneration (*p*), since his employer was quite at liberty to exercise his option of rejection, and his doing so nullified any implied promise to pay (*q*).

Where the employer has treated the "extra" as work done in deviation of the original contract in such a manner as to imply a promise to pay therefor, he may, in reduction of damages, adduce evidence as to the inferiority of the work done (*r*), but the workman is entitled to recover the fair value of the work done and materials supplied (*s*).

Furthermore, the employer may, in reduction of damages, adduce evidence as to any work done or materials supplied by him, which the workman had originally contracted to do or supply himself (*t*).

It may be mentioned that a solicitor's agreement to conduct a suit on his client's behalf is entire, and not divisible, except

Solicitor's agreement to conduct litigation.

(*k*) *Robson v. Godfrey*, (1816) 1 Stark. 725.

(*l*) *Lovelock v. King*, (1831) 1 M. & Rob. 60.

(*m*) *Ellis v. Hamlen*, (1810) 3 Taunt. 52; cf. *Forman v. Liddesdale (The)*, [1900] A. C. 190. *Vide infra*, p. 141.

(*n*) *Appleby v. Myers*, (1867) L. R. 2 C. P. 651, *per* Blackburn, J., at p. 661.

(*o*) *Sinclair v. Boules*, (1829) 9 B. & C. 92; cf. *Munro v. Butt*, (1858) 8 E. & B. 738.

(*p*) *Dobson v. Hudson*, (1857) 1 C. B. N. S. 652.

(*q*) Cf. *Forman v. Liddesdale (The)*, [1900] A. C. 190.

(*r*) *Basten v. Butter*, (1806) 7 East, 479.

(*s*) *Lucas v. Godwin*, (1837) 3 Bing. N. C. 737.

(*t*) *Turner v. Diaper*, (1841) 2 M. & G. 241; *Newton v. Forster*, (1844) 12 M. & W. 772.

where reasonable notice of abandonment be given (*u*). Such notice may, however, be dispensed with where sufficient cause can be shown (*x*).

SECTION II.

Contracts of Hiring and Service.

In this form of contract for the purchase of work and labour, the person employed undertakes to render personal service for a fixed or terminable period, in consideration of wages or commission paid to him.

In contracts of this kind, in accordance with the general rule governing the law of contract, if the *employé* has duly fulfilled his part of the agreement, he is entitled to recover as damages the wages or commission previously agreed upon, or, if no remuneration be specified in the terms of the contract, a just and reasonable remuneration for the kind of work he has performed (*y*).

Employment
of fixed
duration.

If the *employé* be wrongfully dismissed by his employer from an employment of fixed duration before the expiration of his period of service, the *employé* may recover damages, the measure of which is the loss sustained, including compensation for the wages—if any—due to him at the date of dismissal (*z*).

Employé's
duty to obtain
other employ-
ment upon
dismissal.

It is the *employé's* duty to try and obtain other employment in order to minimise the damages (*a*); and the employer can adduce evidence as to the *employé's* opportunities of obtaining such other employment, in mitigation of damages (*b*). If, therefore, it can be shown that, soon after dismissal, the *employé* obtained a situation as good as or better than his former one, such evidence might serve to reduce the damages to a nominal sum (*b*).

Commissions.

The *employé* cannot recover, in cases of wrongful dismissal, commissions which he might have obtained in the course of his employment, if the business in respect of which such com-

(*u*) *Harris v. Osbourn*, (1834) 2 C. & M. 629; cf. *Underwood and Piper v. Lewis*, [1894] 2 Q. B. 306; *Court v. Berlin*, [1897] 2 Q. B. 396.

(*x*) *Nicholls v. Wilson*, (1843) 11 M. & W. 106.

(*y*) Cf. *Prickett v. Badger*, (1856) 1 C. B. N. S. 296.

(*z*) *Goodman v. Pocock*, (1850) 15 Q. B. 576, at pp. 583 and 584; *Hartley v. Harman*, (1840) 11 A. & E. 798; *Elderton v. Emmens*, (1853) 4 H. L. C. 625; cf. *Brace v. Calder*, [1895] 2 Q. B. 253.

(*a*) Cf. *Hartland v. General Exchange Bank*, (1866) 14 L. T. N. S. 863; *Goodman v. Pocock*, *ubi supra*, at p. 584.

(*b*) Cf. *Hochster v. De La Tour*, (1853) 2 E. & B. 678, *per* Lord Campbell, C.J., at p. 691; *Hartland v. General Exchange Bank*, (1866) 14 L. T. 863, *per* Willes, J.; *Reid v. Explosives Co.*, (1887) 19 Q. B. D. 264, at p. 269; *Brace v. Calder*, [1895] 2 Q. B. 253.

missions would accrue depended on the will of the employer (*c*). A dismissed *employé* cannot recover damages in respect of injuries of a sentimental character, such as injury to his feelings or injury arising from the manner of his dismissal (*d*).

Sentimental damages not recoverable.

Where the contract of service is of indefinite, but determinable, duration, the measure of damages for wrongful dismissal is a liquidated sum, namely, the amount of wages for such period of notice as is customary in the particular employment in which the *employé* is engaged (*e*). Thus, a domestic servant may be dismissed upon a month's notice (*f*), and the measure of damages upon summary dismissal is a month's wages (*e*). A newspaper editor is entitled to twelve months' notice (*g*).

Employment of indefinite but determinable duration.

A governess (*h*) or a clerk (*i*) cannot, it would appear, be dismissed under less than one year's notice.

Length of notice required.

Each case stands on its own merits, and, in the absence of express agreement as to time, the hiring is, presumably, for one year (*k*), although evidence as to custom and usage is clearly admissible (*l*).

In cases where the plaintiff seeks to recover damages for summary dismissal from an employment of indefinite duration, but determinable by notice, the claim must be laid in the form of one for damages for failure to give notice (*m*). In these latter cases, arrears of wages must be recovered under a separate count for work and labour done (*n*). The plaintiff cannot treat the contract as being both broken and subsisting (*o*).

Form of action.

A plaintiff may, however, treat the contract as rescinded and sue merely for remuneration in respect of time actually served (*p*). In an action in this form, the employer may adduce evidence as to the plaintiff's ineptitude, as a matter for reduction of damages (*q*).

The same rules as to suing upon a *quantum meruit* apply in contracts of hiring and service as in ordinary contracts of work

(*c*) *Re English and Scottish Marine Insurance Co., Ex parte Maclure*, (1870) 5 Ch. App. 737; cf., however, *Turner v. Goldsmith*, [1891] 1 Q. B. 544, C.A.

(*d*) *Beckham v. Drake*, (1849) 2 H. L. C. 579, per Erle, C.J., at p. 607; *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488.

(*e*) *Fewings v. Tisdal*, (1847) 1 Exch. 295, per Alderson, B., at p. 299; cf., however, *Maw v. Jones*, (1890) 25 Q. B. D. 107.

(*f*) *Fawcett v. Cash*, (1834) 5 B. & Ad. 904, per Littledale, J., at p. 908.

(*g*) *Brennan v. Gilbert-Smith*, (1892) 8 T. L. R. 284; cf., however, *Foxbourne v. Vernon*, (1894) 10 T. L. R. 647.

(*h*) *Todd v. Kerrich*, (1852) 8 Exch. 151.

(*i*) *Beeston v. Collyer*, (1827) 4 Bing. 309.

(*k*) *Beeston v. Collyer*, *ubi supra*, per Best, C.J., at p. 311; cf. *Elderton v. Emmens*, (1853) 4 H. L. C. 625.

(*l*) *Metzner v. Bolton*, (1854) 9 Exch. 518.

(*m*) Cf. *Fewings v. Tisdal*, (1847) 1 Exch. 295.

(*n*) *Harley v. Harman*, (1840) 11 A. & E. 798.

(*o*) Cf. *Goodman v. Pocock*, (1850) 15 Q. B. 576; *French v. Brookes*, (1830) 6 Bing. 354.

(*p*) *Archard v. Hornor*, (1828) 3 C. & P. 349, per Lord Tenterden, C.J., at p. 351.

(*q*) *Baillie v. Kell*, (1838) 4 Bing. N. C. 638.

and labour (*r*). It therefore follows that no *employé*, dismissed for misconduct, whether the contract of service be one of specified or indefinite duration, can recover wages accruing to him since the day when his last preceding salary became due (*s*).

Salaries
apportionable
by statute.

In passing, it may be noted that salaries are now, by statute, apportionable in respect of time, and, in case of death, may be deemed to have accrued from day to day (*t*).

Employer's
obligation to
provide
employment.

In the case of agreements to retain and employ, disputes frequently arise as to whether there is or is not an actual undertaking to supply work. As a general rule, it may be laid down that such an undertaking is not implied (*u*), except where the agreement is one for exclusive service, in which case a presumption as to an undertaking will arise (*x*), or where there is a clause as to determining the "employment" by notice, in which case such presumption may also arise (*y*).

Consequences
of breach of
contract by
employé.

An employer may recover substantial damages from a servant who wrongfully breaks his contract of service (*z*), and such servant *ipso facto* disentitles himself from claiming wages in respect of services rendered since the day when his last preceding salary became due (*a*).

An employer may also recover damages from a servant for wrongful breach of confidence, and may obtain an injunction restraining his servant from the continuance of such breach (*b*), except in cases where the contract of service provides for liquidated damages, when the employer must choose between claiming for an injunction and claiming damages (*c*).

Executory
agreements
of service.

In conclusion, it should be noted that, in cases of executory agreements of service, either party may, before the time for fulfilment arrives, be guilty of breach of contract either by renouncing the contract or by disabling himself from fulfilling it (*d*). An action may under such circumstances be brought before the date for fulfilment of the contract (*d*).

Employé's
right to
recover wages
if ready and

Where there is a contract that a servant shall render specified services during a specified time and receive certain wages in respect thereof, the employer cannot be sued for failure to

(*r*) *O'Neil v. Armstrong*, [1895] 2 Q. B. 418; cf. *Ridgway v. Hungerford Market Co.*, (1835) 3 A. & E. 171. *Vide supra*, p. 140.

(*s*) *Boston v. Ansell*, (1888) 39 Ch. D. 339.

(*t*) Cf. Apportionment Act, 33 & 34 Vict. c. 35, ss. 1, 2, and 5.

(*u*) *Turner v. Sawdon*, [1901] 2 K. B. 653; cf. *Elderton v. Emmens*, (1853) 4 H. L. C. 625, *per* Parke, B.; *Rhodes v. Forwood*, (1876) 1 App. Cas. 256.

(*x*) *Pilkington v. Scott*, (1846) 15 M. & W. 657.

(*y*) *Devonald v. Rosser*, [1906] 2 K. B. 728.

(*z*) *Bowes v. Press*, [1894] 1 Q. B. 202.

(*a*) *Ridgway v. Hungerford Market Co.*, (1835) 3 A. & E. 171.

(*b*) *Robb v. Green*, [1895] 2 Q. B. 315.

(*c*) *General Accident Ass. Corp. v. Noel*, [1902] 1 K. B. 377.

(*d*) *Hochster v. De La Tour*, (1853) 2 E. & B. 678; cf. *Elderton v. Emmens*, (1853) 4 H. L. C. 625.

provide work (*e*). Nevertheless, the servant, upon fulfilling the precedent conditions as to being ready and willing to perform his part of the contract, may from time to time recover his stipulated wages, as they fall due (*f*). willing to perform his work.

(*e*) *Churchward v. The Queen*, (1865) L. R. 1 Q. B. 173 ; cf., however, *McIntyre v. Belcher*, (1863) 14 C. B. N. S. 654.

(*f*) *Aspdin v. Austin*, (1844) 5 Q. B. 671 ; *Dunn v. Sayles*, (1844) 5 Q. B. 685.

CHAPTER VII.

- Section I.—Debt.
„ II.—Contracts of Suretyship.
„ III.—Insurance.

SECTION I.

Debt.

UNDER the system of pleading which obtained before the Judicature Act, 1873, an action for debt constituted one of the forms of personal actions. If a plaintiff sued upon a money count, and it subsequently appeared that there existed a special contract, he was nonsuited, and was compelled to pay the costs of the first action before he could bring another on the special contract (*a*). Under the present system, however, if it appears from the statement of claim that the plaintiff would have been entitled to recover in any form of action, he may recover in the action which he has brought.

Damages
recoverable
for breach of
contract to
pay money.

If a contract, to pay money due, be broken, the measure of damages is, ordinarily, the amount of the debt together with nominal damages for its detention (*b*); but substantial damages may be given if special damage, of a kind directly proceeding from the defendant's breach of contract, be proved (*c*).

Interest.

Interest cannot, as a general rule, be claimed, by way of damages, apart from any agreement, for detention of a debt (*d*), except in those cases in which there exists an express statutory provision to the effect that interest may be allowed (*e*), and in certain other specified cases. (*Vide* Chap. II., Section III., Interest.)

But, in those cases in which there exists an agreement that interest shall be paid (*f*), or in which such agreement is implied from the usage of trade, as in the case of mercantile instruments,

(*a*) Cf. *White v. G. W. Ry. Co.*, (1857) 2 C. B. N. S. 7.

(*b*) *Wilde v. Clarkson*, (1795) 6 T. R. 303, at p. 304; cf. *Hamlin v. G. N. Ry. Co.*, (1856) 1 H. & N. 408, *per* Pollock, C.B., at p. 411.

(*c*) Cf. *Henry v. Earl*, (1841) 8 M. & W. 228, *per* Lord Abinger, C.B., at p. 233; *Hamlin v. G. N. Ry. Co.*, *ubi supra*, at p. 411; *Watkins v. Morgan*, (1834) 6 C. & P. 661.

(*d*) *Higgins v. Sargent*, (1823) 2 B. & C. 348; *Page v. Newman*, (1829) 9 B. & C. 378; *London, Chatham and Dover Ry. Co. v. S. E. Ry. Co.*, [1893] A. C. 429; cf., however, *Johnson v. Durant*, (1830) 4 C. & P. 327; *Arnott v. Redfern*, (1826) 3 Bing. 353, *per* Best, C.J.

(*e*) *Vide infra*, p. 147.

(*f*) Cf. *Watkins v. Morgan*, (1834) 6 C. & P. 661.

interest may be recovered, either as part of the debt, or as damages for detention (*g*), as the case may be.

Further, in an action upon a mortgage deed, where the principal and interest become due upon a certain day, the mortgagee, upon default, may recover interest by way of damages for detention of the debt (*h*), even apart from any statute (*h*).

Interest on a deposit is, similarly, recoverable by way of special damage, in an action against a vendor for failure to complete an agreement for the sale of real property (*i*); but, in such cases, interest *qua* interest is not directly recoverable (*k*).

But interest is not recoverable, even as special damages, in an action against an auctioneer for the return of a deposit (*l*); nor is interest recoverable in actions for money had and received (*m*), or for money lent, unless there has been a course of dealing between the parties in which interest was allowed (*n*).

It is enacted by the Law Amendment Act, 1833 (3 & 4 Will. 4, c. 42), s. 28, that upon all debts payable at a certain time, or otherwise, the jury may, if they think fit, give the current interest as damages from the time of payment, if payable by written agreement at a certain time; if otherwise, then from demand of payment in writing, if notice is given that interest will be claimed (*o*).

Law Amend-
ment Act,
1833.

If the defendant, in an action for debt, pay the debt after action brought, but before judgment, the plaintiff is none the less entitled to nominal damages for detention of the debt (*p*), unless the plaintiff has accepted the amount paid as being in full satisfaction of debt, damages, and costs, in which case the defendant is entitled to a verdict (*q*).

Payment of
debt after
action
brought.

If the defendant pay the debt before action brought, though after the date upon which it was due, the acceptance of the amount by the plaintiff prevents the latter from maintaining any action for nominal damages for detention of the debt (*r*).

Payment of
debt before
action.

(*g*) Cf. *Page v. Newman*, (1829) 9 B. & C. 378, *per* Lord Tenterden, at p. 381; *Shaw v. Picton*, (1825) 4 B. & C. 715, at p. 723.

(*h*) *Price v. G. W. Ry. Co.*, (1847) 16 M. & W. 244, at p. 248.

(*i*) *De Bernales v. Wood*, (1812) 3 Camp. 258; *Farquhar v. Farley*, (1817) 7 Taunt. 592.

(*k*) *Bradshaw v. Bennett*, (1831) 5 C. & P. 48; cf. *Price v. G. W. Ry. Co.*, *ubi supra*, *per* Parke, B., at p. 248.

(*l*) *Harrington v. Hoggart*, (1830) 1 B. & Ad. 577; cf. *Lee v. Munn*, (1817) 8 Taunt. 45.

(*m*) *Walker v. Constable*, (1798) 1 B. & P. 306; *Shaw v. Picton*, (1825) 4 B. & C. 715, *per* Abbott, C.J., at p. 723; *Frühling v. Schroeder*, (1835) 2 Bing. N. C. 77.

(*n*) *Calton v. Bragg*, (1812) 15 East, 223.

(*o*) *Vide supra*, pp. 32 *seqq.*

(*p*) *Nosotti v. Page*, (1851) 10 C. B. 643, *per* Maule, J., at p. 644; cf. *Cook v. Hopewell*, (1856) 11 Exch. 555.

(*q*) *Thame v. Boast*, (1848) 12 Q. B. 808.

(*r*) *Beaumont v. Greathead*, (1846) 2 C. B. 494, *per* Maule, J., at p. 499; *Tetley v. Wanless*, (1867) L. R. 2 Ex. 275, *per* Willes, J., at p. 280.

Bonds.

Bonds.—In an action for debt upon a bond, executed to secure the performance of conditions or covenants, the amount of damages recoverable, upon the forfeiture of such bond by reason of a breach of such conditions or covenants, is limited, both in law and equity, to the amount of the penalty fixed by the terms of the bond, together with costs(s). It makes no difference whether the principal and interest payable according to the condition, or the damages actually sustained by the breach, do or do not exceed such amount(s).

In the case, however, of a bond which is not, in its nature, really penal, as, for instance, a bond to secure the repayment of a certain sum with an express provision for the payment of lawful interest, interest may be recovered over and above the amount specified in the bond(t).

Interest over and above the amount of the penalty may also, apparently, be recovered in an action upon a judgment previously obtained on a bond(u).

Furthermore, where payments have been made as interest and applied as such, and the amount of interest due at any one time, together with the principal, has never reached the amount of the penalty, the rule which prevents a bond creditor from being paid more than the amount of the penalty does not apply(x).

Penalty not
contained in
a bond.

It may be observed, in passing, that if the penalty is contained in an instrument other than a bond, the plaintiff may either bring an action of debt to recover the penalty, if it be recoverable (*vide supra* p. 24), or he may sue upon the contract or covenant and recover more or less than the penalty *toties quoties* (y). If, therefore, the latter course be adopted, damages beyond the amount of the penalty may, in fit cases, be awarded(z).

8 & 9 Will. 3,
assignment of
breaches.

It is enacted by 8 & 9 Will. 3, c. 11, s. 8, that in all actions, in any court of record, upon any bond or on any penal sum, for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff must (a) assign a breach of the condition, or he may assign as many breaches as he shall think fit; furthermore, although the plaintiff can, upon proving a breach of a condition, obtain judgment for the full amount of the penalty fixed, he cannot obtain execution for more than the amount of the damages actually sustained by the

(s) *Brangwin v. Perrott*, (1777) 2 W. Bl. 1190; *Wilde v. Clarkson*, (1795) 6 T. R. 303; *Hatton v. Harris*, [1892] A. C. 547.

(t) *Francis v. Wilson*, (1824) 1 Ry. & M. 105.

(u) *M'Clure v. Dunkin*, (1801) 1 East, 436.

(x) *Knipe v. Blair*, [1900] 1 I. R. 372.

(y) Cf. *Lowe v. Peers*, (1768) 4 Burr. 2225, *per* Lord Mansfield, at p. 2228.

(z) Cf. *Harrison v. Wright*, (1811) 13 East, 343.

(a) Cf. *Roles v. Rosewell*, (1794) 5 T. R. 538; *Friar v. Grey*, (1850) 15 Q. B. 891, *per* Parke, B., at p. 911; cf., however, *R. v. Peto*, (1826) 1 Y. & J. 169, 171.

breach or breaches assigned (*b*). Such amount must be assessed by a jury even though judgment be obtained by default (*c*). The judgment, however, remains in force as a security for further breaches (*d*).

The bonds which come within the purview of this latter statute are bonds for the payment of an annuity (*e*); bonds for the performance of an arbitration award (*f*), but in such cases the damages recoverable may be determined by the award—not by a jury (*f*); bonds for the payment of a specified sum of money by instalments (*g*). Special statutory provisions apply to replevin bonds (*h*). It is enacted by 4 & 5 Anne, c. 16, s. 12, that where an action is brought upon any bond which contains a condition rendering the bond void upon payment of a lesser sum at a certain day or place, the payment of the principal and interest due by the condition of such bond, though such payment was not made in strict accordance with the condition, may, nevertheless, be pleaded as effectually as if the money had been paid strictly in accordance with the condition.

Furthermore, it is provided by the same statute (*i*) that if at any time, pending an action upon any such bond, the defendant shall bring into court the whole amount of the principal, interest, and costs, the amount, so paid in, shall be deemed to be a full satisfaction and discharge of such bond.

The statute of Anne applies to post obit bonds, when the period for the payment of the principal has once elapsed (*k*). Similarly, a bond for the payment of a sum certain, at a day certain, is not within the statute of William III., for, in order to ascertain the precise sum due, computation only is necessary (*k*).

The statute of William III. applies to bonds conditioned for the payment of a certain sum at a future date, and, in the meantime, for the payment of interest at fixed intervals (*l*); so that if an action be brought upon a forfeiture of the bond, before such future date, it is necessary to assign a breach or breaches.

On the other hand, in the case of these last-mentioned bonds,

(*b*) Cf. *Hardy v. Bern*, (1794) 5 T. R. 636, also 540; *Walcot v. Goulding*, (1799) 8 T. R. 126; *Betts v. Burch*, (1859) 4 H. & N. 506, *per* Bramwell, B., at p. 510.

(*c*) *Roles v. Rosewell*, (1794) 5 T. R. 538.

(*d*) *Judd v. Evans*, (1795) 6 T. R. 399.

(*e*) *Walcot v. Goulding*, *ubi supra*; *Collins v. Collins*, (1759) 2 Burr. 820; *Tuther v. Caralampi*, (1888) 21 Q. B. D. 414.

(*f*) *Welch v. Ireland*, (1805) 6 East, 613.

(*g*) *Willoughby v. Swinton*, (1805) 6 East, 550; *Harrington v. Cox*, (1852) 3 Ir. C. L. R. 87; *Preston v. Dania*, (1872) L. R. 8 Exch. 19.

(*h*) *Vide supra*, p. 120.

(*i*) S. 13.

(*k*) *Smith v. Bond*, (1833) 10 Bing. 125, at p. 132; *Murray v. Stair (Earl of)*, (1823) 2 B. & C. 82; cf. *Gerrard v. Clowes*, [1892] 2 Q. B. 11.

(*l*) *Tighe v. Crafter*, (1810) 2 Taunt. 387; *Wheelhouse v. Ladbroke*, (1858) 3 H. & N. 291.

the statute of Anne applies if the action be brought after the date fixed for the payment of the principal (*m*).

Similarly, the statute of William III. does not apply to bonds for the payment of principal and interest containing a condition that, upon default in the payment of interest, the whole amount of principal and interest shall become forthwith due (*n*).

Interest in
addition to
penalty.

Interest, beyond the amount of the penalty fixed in a bond, may be recovered in the case of bonds in which the sum named in the obligatory part is in excess of the sum named in the condition, even though interest be not expressly reserved, since an agreement for the payment of interest may be implied; and, if no date for payment be fixed, interest will be deemed to run from the date of the bond (*o*). But interest cannot be recovered in the case of single bonds, or where the sums named in the obligatory part of the bond and in the condition are identical (*p*).

Procedure by
writ.

It is provided by Ord. XIII., r. 14, R. S. C., that where a writ is indorsed with a claim on a bond within 8 & 9 Will. 3, c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may, at once, suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute, and in 3 & 4 Will. 4, c. 42, s. 16. The latter statute provides for trial before a sheriff, instead of before a judge of assize or *nisi prius*.

The procedure prescribed by this rule supersedes, in cases to which it applies, other methods of obtaining judgment on claims within its terms (*q*). A defendant may, under Ord. XXII., r. 1, pay money into court to particular breaches, but not to the whole action (*r*). But, in an action on a common money bond, to which the statute of Anne is applicable, the plaintiff's claim may be made by a specially indorsed writ under Ord. XIV. (*s*).

Similarly, a specially indorsed writ may be issued, and proceedings taken for summary judgment, in order to recover an amount due under a bond for payment of a sum, as liquidated damages, in default of performance of the conditions of the bond; or in any case where the sum named in the obligatory part of the bond is not in the nature of a penalty, as, for instance, in the case of a bond to secure payment of a certain sum by instalments—the whole amount becoming due upon failure to pay any given instalment (*t*).

(*m*) Cf. *Roakes v. Manser*, (1845) 1 C. B. 531, *per* Tindal, C.J., at p. 542.

(*n*) *James v. Thomas*, (1833) 5 B. & Ad. 40.

(*o*) *In re Dixon*, [1900] 2 Ch. 561; cf. *Cameron v. Smith*, (1819) 2 B. & Ald. 305, at p. 308.

(*p*) *Hogan v. Page*, (1798) 1 B. & P. 337; cf. *Foster v. Weston*, (1830) 6 Bing. 709.

(*q*) *Tutler v. Caralampi*, (1888) 21 Q. B. D. 414.

(*r*) Cf. *Preston v. Dania*, (1872) L. R. 8 Exch. 19.

(*s*) *Gerrard v. Clowes*, [1892] 2 Q. B. 11; *In re Dixon*, [1900] 2 Ch. 561.

(*t*) Cf. *Strickland v. Williams*, [1899] 1 Q. B. 382; *Goad v. Empire Printing Co.*, (1888) 52 J. P. 438.

The distinction between liquidated damages and penalty has already been discussed (*u*).

SECTION II.

Contracts of Suretyship.

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Guaranties.

A guarantee, or contract of indemnity, is a contract which is accessory or subsidiary to some other contract, or liability. It involves the rights and liabilities of three parties—the promisor, the promisee, and a third party, or—to use different terms—the surety, the principal creditor, and the principal debtor. The so-called principal creditor and principal debtor are, of course, the parties to the original contract to which the guarantee, or contract of indemnity, may be said to be “collateral.” By means of the guarantee, the liability of the principal debtor, in case of his default, is thrown upon the surety.

It is provided by Ord. XVI., r. 6, R. S. C., that the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract. This provision extends, of course, to contracts of guarantee, so that a bond, which makes the principal and sureties liable, may be enforced against them in the same action (*x*).

Measure of the Surety's Liability.

In an action against the surety by the creditor, the measure of damages is, in general, the amount of the debt due to, or the loss incurred by, the plaintiff, in so far as the defendant has agreed to be liable therefor. The amount recoverable from each of several sureties, under the same guarantee, depends upon whether the contract of guarantee is to be interpreted as joint or several. If each surety has made himself severally liable for a certain fixed separate sum, that amount may be recovered from each surety in turn (*y*), but if each surety has bound himself jointly and severally, or even only severally, in respect of a certain fixed

Measure of damages.

Several liability.

Joint liability.

(*u*) *Vide supra*, Chap. II., Sect. II., p. 24.

(*x*) Cf. *Berwick Corporation v. Murray*, (1856) 7 De G. M. & G. 497.

(*y*) *Fell v. Goslin*, (1852) 7 Exch. 185; *Collins v. Prosser*, (1823) 1 B. & C. 682; cf. *Ellis v. Emmanuel*, (1876) 1 Ex. D. 157.

Contribution. sum, which represents the aggregate liability of all the sureties, payment of such sum by one surety discharges the liability of the others, and entitles such surety to claim contribution (*z*).

Where it appears upon an instrument that a promise by two contractors is intended to be joint, it may be treated as such, although the promise be in terms several only (*a*).

The surety cannot be made liable for more than he has undertaken (*b*), and his obligation will be strictly construed (*c*).

Consequential loss. In other words, the loss, in respect of which the plaintiff claims compensation under the guarantee, must not be of too remote a character (*d*).

Liabilities comprised within a guarantee. The promisee or principal creditor may, however, usually, if he act within the terms of the indemnity, recover from the surety all damages which he may be called upon to pay in any legal proceedings concerning matters which come within the purview of the indemnity (*e*), together with costs reasonably incurred in connection therewith (*f*). But the surety cannot be made liable for costs incurred in respect of unsuccessful proceedings against the principal debtor, unless the creditor has previously given notice to the surety of his intention to take such proceedings (*g*).

It is to be observed that, if the promisee is sued upon a cause of action against which the surety has agreed to indemnify him, the promisee may claim indemnity, even though he has compromised the action at an intermediate stage (*h*), unless it can be shown by the surety, upon whom the burden of proof rests, that the compromise was injudicious (*h*).

If notice of the action against the promisee be given to the surety, and the latter neglects to defend such action, he is completely estopped from denying liability for the claim against the promisee, even though the latter pay before judgment is obtained (*i*).

Liability for interest. If the debt for which the surety has made himself liable itself

(*z*) *Collins v. Prosser*, (1823) 1 B. & C. 682, *per* Holroyd, J., at p. 688. *Vide infra*, p. 156.

(*a*) *Cf. Lee v. Nixon*, (1834) 3 N. & M. 441.

(*b*) *Warre v. Calvert*, (1837) 7 Ad. & E. 143; *Wembley U. D. C. v. Poor Law Guarantee Association*, (1901) 17 T. L. R. 516.

(*c*) *Cf. Stamford Banking Co. v. Ball*, (1862) 4 De G. F. & J. 310. *Cf.*, however, *Lloyd's v. Harper*, (1880) 16 Ch. D. 290.

(*d*) *Cf. King v. Norman*, (1847) 4 C. B. 884; *Walker v. Broadhurst*, (1853) 8 Ex. 889; *Tanner v. Woolmer*, (1853) 8 Ex. 482; *Ex parte Young*, (1881) 17 Ch. D. 668; *Cosford Union v. Poor Law Guarantee Association*, (1910) 103 L. T. 463.

(*e*) *Gooch v. Clutterbuck*, [1899] 2 Q. B. 148; *The Millwall*, [1905] P. 155; *cf. Barnett v. Eccles Corporation*, [1900] 2 Q. B. 104, 423; *Smith v. Compton*, (1832) 3 B. & Ad. 407.

(*f*) *Howard v. Lovegrove*, (1870) L. R. 6 Exch. 43; *Hatch, Mansfield & Co. v. Weingott*, (1906) 22 T. L. R. 366. As to solicitor and client costs, see *Fisher v. G. W. Ry. Co.*, [1905] 1 Ch. 316, at p. 324.

(*g*) *Baker v. Garratt*, (1825) 3 Bing. 36, *per* Best, C.J., at p. 60. *Vide* Ch. 12, s. 3, recovery of costs.

(*h*) *Newborough (Lord) v. Schröder*, (1849) 7 C. B. 342, at p. 399; *cf. Farebrother v. Worsley*, (1831) 5 C. & P. 102.

(*i*) *Jones v. Williams*, (1841) 7 M. & W. 493, *per* Parke, B., at p. 501.

bears interest, *e.g.*, a bill of exchange, the surety is liable to pay interest upon it (*k*).

But, where the liability of the surety is expressly limited to a certain fixed sum, as principal, the liability, for principal, cannot exceed such fixed sum, though interest in addition may be recoverable (*l*).

Where a surety expressly limits the extent of his liability, but does not stipulate that the principal debtor may not incur a greater liability to the principal creditor, questions frequently arise as to the manner in which the principal creditor can adjust his claims against the respective parties.

Where the debtor's liability exceeds the surety's.

It is now established that in the case of a guarantee given for the purpose of securing a floating balance, the guarantee is to be construed, *prima facie* at least, for a part only of the debt (*m*). Thus, if a surety give a guarantee to the extent of 400*l.*, and the principal debtor become indebted to the extent of 625*l.*, upon which sum the latter can only pay 8*s.* 7*d.* in the pound, the surety can only be made liable for 11*s.* 5*d.* in the pound upon the sum of 400*l.* (*n*).

On the other hand, in the case of a limited guarantee given, not for a floating balance, but in respect of a debt already ascertained, which exceeds in amount the limit of the guarantee, no such presumption arises. In other words, it is a question of construction, to be decided in each case, whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (*o*).

A surety is entitled to plead, by way of set-off, any set-off or counterclaim, which the principal debtor may possess against the creditor, arising out of the same transaction as that from which the surety's liability originated (*p*).

Surety entitled to plead set-off of debtor.

It is to be noted that upon a contract to indemnify a plaintiff against costs, which he is ultimately called upon to pay, the cause of action against the surety arises when the plaintiff pays—not when the costs are incurred or the solicitor's bill is delivered to the plaintiff (*q*).

When cause of action against surety arises.

(*k*) Cf. *Ackermann v. Ehrensperger*, (1846) 16 M. & W. 99; *King v. Greenhill*, (1843) 6 Man. & Gr. 59; *Parr's Banking Co. v. Yates*, [1898] 2 Q. B. 460; *Re Dixon*, [1900] 2 Ch. 561.

(*l*) *Meek v. Wallis*, (1872) 27 L. T. 650; cf. *Parr's Banking Co. v. Yates*, [1898] 2 Q. B. 460.

(*m*) *Ellis v. Emmanuel*, (1876) 1 Ex. D. 157, *per* Blackburn, J., at p. 168; *Hobson v. Bass*, (1871) 6 Ch. App. 792, at p. 794; *Gray v. Seckham*, (1872) 7 Ch. App. 680; *Veitch v. National Bank of Scotland*, (1907) S. C. 554; cf. *Ex parte National Provincial Bank of England*, (1881) 17 Ch. D. 98.

(*n*) *Bardwell v. Lydall*, (1831) 7 Bing. 489.

(*o*) *Ellis v. Emmanuel*, (1876) 1 Ex. D. 157, *per* Blackburn, J., at pp. 168, 169; cf. *Ex parte National Provincial Bank of England*, (1881) 17 Ch. D. 98.

(*p*) *Bechervaise v. Lewis*, (1872) L. R. 7 C. P. 372; *Murphy v. Glas*, (1869) 20 L. T. 461; cf. *Thornton v. Maynard*, (1875) L. R. 10 C. P. 695.

(*q*) *Collinge v. Heywood*, (1839) 9 A. & E. 633; cf. *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772; *Loosemore v. Radford*, (1842) 9 M. & W. 657.

But, of course, if the contract be, in terms, to indemnify when the bill of costs is delivered, the cause of action arises when the bill is delivered (*r*).

The principle governing the cases referred to in the preceding paragraph may be said to be one of general application in contracts of indemnity. Therefore, except where the contract of indemnity stipulates the contrary, a surety does not incur liability until the principal creditor has actually been damnified (*s*). But questions frequently arise as to what constitutes damnification (*t*). It would appear that a judgment obtained against the plaintiff undoubtedly constitutes sufficient damnification to give rise to a cause of action against the surety (*u*), even though the plaintiff has not satisfied the judgment.

Guarantee
implied by
law.

In certain cases, a contract of indemnity arises by implication of law. Thus, if a lessee assign his lease, he becomes liable to the lessor for the due performance by the assignee of the covenants in the lease (*x*). The lessee, in other words, stands in the position of a surety, and a duty is consequently imposed upon the assignee to perform those covenants for breach of which by him an action will lie by the lessor against the lessee (*y*). Consequently, the assignee, or even a successive assignee, is under an implied obligation to indemnify the lessee (*z*).

The underlying principle of the cases just referred to is that "where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned" (*a*).

On the other hand, an under-lessee is in a position quite different from that of an assignee.

No guarantee
implied
between
lessee and
sub-lessee.

No privity of contract subsists between a landlord or lessor and a sub-lessee. Therefore, since the sub-lessee is under no liability to the landlord in respect of covenants contained in the original lease (*b*), no contract of indemnity is implied as between the sub-lessee and the lessee, in respect of damage incurred by the latter in consequence of the landlord suing for breach of covenant (*c*).

(*r*) *Collinge v. Heywood*, (1839) 9 A. & E. 633, *per* Littledale, J., at p. 640; cf. *Spark v. Heslop*, (1859) 1 E. & E. 563.

(*s*) Cf. *Reynolds v. Doyle*, (1840) 1 Man. & Gr. 753; *Ashdown v. Ingamells*, (1880) 5 Ex. D. 280; see also cases in notes (*q*) and (*r*), *supra*.

(*t*) Cf. *Ashdown v. Ingamells*, *ubi supra*; *Lewis v. Smith*, (1850) 9 C. B. 610.

(*u*) *Warwick v. Richardson*, (1842) 10 M. & W. 284; *Smith v. Howell*, (1851) 6 Ex. 730; *Carr v. Roberts*, (1833) 5 B. & Ad. 78.

(*x*) *Humble v. Langston*, (1841) 7 M. & W. 517, *per* Parke, B., at p. 530.

(*y*) *Humble v. Langston*, *ubi supra*, at p. 530; *Burnett v. Lynch*, (1826) 5 B. & C. 589, *per* Bayley, J., at p. 603, and *per* Holroyd, J., at p. 607.

(*z*) *Moule v. Garrett*, (1870) L. R. 5 Ex. 132; (1872) L. R. 7 Ex. 101, at p. 104.

(*a*) *Bonner v. Tottenham, etc., Building Society*, [1899] 1 Q. B. 161, *per* Vaughan Williams, L.J., at p. 173; cf. also *Re Rhodes*, (1889) 44 Ch. D. 94.

(*b*) Cf. *Holford v. Hatch*, (1779) 1 Dougl. 182.

(*c*) *Bonner v. Tottenham, etc., Building Society*, [1899] 1 Q. B. 161; *Logan v. Hall*, (1847) 4 C. B. 598. *Vide supra* p. 68.

But, of course, the sub-lessee usually enters into certain covenants with the lessee, which may, or may not, be identical with those contained in the original lease, and he may be sued by the lessee for breach of such covenants (*d*). The measure of damages, however, in such an action is not directly regulated by the loss, if any, sustained by the lessee in consequence of the landlord having sued him for breach of covenant upon the original lease (*e*).

It may be observed that there exists no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it (*f*).

Mere receipt of benefit does not imply right to contribution.

On the other hand, it is to be noted that in cases where there is a partial loss in consequence of an injury to a ship arising from a peril insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances, as the measure of his loss (*g*). But, in such cases, if the shipowner claim reimbursement from the insurer, he must show that, in the circumstances, he had no alternative but to execute the repairs (*h*).

Other instances of a contract of indemnity being implied in law are to be found in cases where a mortgagee agrees to postpone his charge upon the mortgaged property in order to enable the mortgagor to obtain a further advance (*i*); where a vendor of shares is compelled, owing to his being the registered holder, to pay calls upon shares made at a date subsequent to the sale of the shares to the purchaser (*k*); where a banker, though acting in a *bonâ fide* manner, sends to a company a forged transfer to be registered (*l*); where money is paid in relief of another, under compulsion, but innocently, even though the payment was illegal (*m*); where one person employs another as his agent to do a particular act which entails a loss to the latter (*n*); where a trustee, in the course of the proper management of the trust

Further instances of guarantee implied by law.

(*d*) *Hornby v. Cardwell*, (1878) 8 Q. B. D. 329.

(*e*) Cf. *Penley v. Watts*, (1841) 7 M. & W. 601; *Walker v. Hatton*, (1842) 10 M. & W. 249; *Clare v. Dobson*, [1911] 1 K. B. 35; cf., however, *Hornby v. Cardwell*, *ubi supra*, at p. 337.

(*f*) *Ruabon Steamship Co. v. London Assurance Co.*, [1900] A. C. 6; *The Acanthus*, [1902] P. 17. *Vide infra*, p. 157.

(*g*) *Marine Insurance Co. v. China Transpacific Steamship Co.*, (1886) 11 App. Cas. 573; *Ruabon Steamship Co. v. London Assurance Co.*, *ubi supra*, per Lord Brampton, at p. 16.

(*h*) *The Haversham Grange*, [1905] P. 307, per Collins, M.R., at p. 314.

(*i*) *Ex parte Ford*, (1885) 16 Q. B. D. 305.

(*k*) *Kellock v. Enthoven*, (1874) L. R. 9 Q. B. 241; cf. *Hardoon v. Belilios*, [1901] A. C. 118.

(*l*) *Sheffield Corporation v. Barclay*, [1905] A. C. 392; cf. *Bank of England v. Cutler*, [1908] 2 K. B. 208.

(*m*) *Moxham v. Grant*, [1900] 1 Q. B. 88, at pp. 94 and 95; cf. *R. v. Porter*, [1910] 1 K. B. 369, at p. 372.

(*n*) *Read v. Anderson*, (1884) 13 Q. B. D. 779; cf. *Ellis v. Pond*, [1898] 1 Q. B. 426.

estate, becomes personally subject to a legal liability (*o*); where one person induces another to contract with him, as the agent of a third party, by an untrue but unqualified assertion of his being authorised to act as such agent (*p*).

It is to be observed that, in the instance last mentioned, the indemnity may comprise loss of profits (*q*), but that the damages recoverable, not for a breach of warranty of authority, but for a mere false representation by the defendant that he has effected a bargain between the plaintiff and a third party, do not comprise more than the actual damage sustained (*r*).

Liability of Co-sureties inter se.

The rights and liabilities of co-sureties to contribution arise from the common interest and common burden which affect all the co-sureties, by reason of their having entered into a contract of guarantee (*s*).

Basis of right
to contribu-
tion.

Contribution is based upon a general principle of equity (*s*), and is enforceable, whether the co-sureties are bound jointly and severally (*t*), or severally (*u*); and whether they are bound in one, or more than one, instrument; and whether they did, or did not, know of each other's obligations (*x*). But it is to be observed that, where the co-sureties are bound in different instruments, the sums, specified in each, ascertain the proportion of the whole debt which each co-surety may be called upon to pay; whereas, if the co-sureties are all bound in one instrument, they must all contribute equally (*y*).

No right to contribution arises where the parties are not liable to a common demand. Hence, in cases where there are several under-lessees at distinct rents of separate portions of premises, the whole of which are held under one original lease at an entire rent, if one of the under-lessees pays the whole rent under a threat of distress, he cannot claim from the other under-lessees their proportion of rent as contribution (*z*). His only remedy is in equity, if at all (*a*).

(*o*) *Benett v. Wyndham*, (1862) 4 D. F. & J. 259.

(*p*) *Collen v. Wright*, (1857) 8 E. & B. 647, at p. 657; cf. *Salvesen v. Rederi*, [1905] A. C. 302; *Hughes v. Graeme*, (1864) 33 L. J. Q. B. 335; *Simons v. Patchett*, (1857) 7 E. & B. 568; *Godwin v. Francis*, (1870) L. R. 5 C. P. 295; *Firbank's Exors. v. Humphreys*, (1886) 13 Q. B. D. 54; *Starkey v. Bank of England*, [1903] A. C. 114.

(*q*) *Hughes v. Graeme*, *ubi supra*; *Godwin v. Francis*, *ubi supra*.

(*r*) *Salvesen v. Rederi*, *ubi supra*, per Lord Halsbury, at pp. 309 and 310. *Vide infra*, p. 276.

(*s*) *Deering v. Winchelsea (Earl of)*, (1800) 2 B. & P. 270, at p. 273; *American Surety Co. v. Wrightson*, (1910) 103 L. T. 663.

(*t*) *Underhill v. Horwood*, (1804) 10 Ves. 209, at p. 226.

(*u*) *Cf. Ward v. National Bank of New Zealand*, (1883) 8 App. Cas. 755, at p. 765.

(*x*) *Craythorne v. Swinburne*, (1807) 14 Ves. 160, at p. 165.

(*y*) *Deering v. Winchelsea (Earl of)*, *ubi supra*, at p. 273.

(*z*) *Hunter v. Hunt*, (1845) 1 C. B. 300; *Johnson v. Wild*, (1890) 44 Ch. D. 146; cf., however, *Boulter v. Peplow*, (1850) 9 C. B. 493.

(*a*) *Hunter v. Hunt*, *ubi supra*, at p. 305.

There exists no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it (*b*).

An action for contribution arises when, but does not arise until, the co-surety, who sues, is able to show that he has paid more than his due proportion of what the sureties can ever be called upon to pay (*c*). This rule applies even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor (*d*).

When cause of action arises.

But the rule must be qualified to this extent: there is authority to the effect that, if the principal creditor has actually obtained judgment against one surety for the full amount of the guarantee, the latter may obtain a prospective order against a co-surety under which he can recover from such co-surety any sum paid in excess of his proper share (*e*).

If one surety has been induced by another to enter into a contract of suretyship, the latter is unable to compel the former to contribute (*f*).

Suretyship induced by joint-surety.

Amount of Contribution.

The amount of contribution, which any one of several co-sureties can recover from the others, depends—*ceteris paribus*—upon the number of solvent sureties (*g*). If the sureties are not bound in equal amounts, their liability is governed by the proportionate amount in respect of which each has rendered himself liable (*h*).

A surety, who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security (*i*).

Where counter-security has been given by debtor.

A surety, claiming contribution from his co-sureties, may recover interest, at the rate of 4 per cent., upon the sum paid by

Interest.

(*b*) *Ruabon Steamship Co. v. London Assurance Co.*, [1900] A. C. 6; *The Acanthus*, [1902] P. 17; cf. *Leigh v. Dickeson*, (1883) 12 Q. B. D. 194.

(*c*) *Davies v. Humphreys*, (1840) 6 M. & W. 153, per Parke, B., at p. 169; *Stirling v. Burdett*, [1911] 2 Ch. 418.

(*d*) *Re Snowdon*, (1881) 17 Ch. D. 44.

(*e*) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(*f*) *Turner v. Davies*, (1796) 2 Esp. 479; cf. *Done v. Walley*, (1848) 2 Exch. 198.

(*g*) *Lowe v. Dixon*, (1885) 16 Q. B. D. 455, at p. 458; *Buchanan v. Main*, (1900) 3 F. (Ct. of Sess.) 215.

(*h*) *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; cf. *American Surety Co. v. Wrightson*, (1910) 103 L. T. 663; *Craythorne v. Swinburne*, (1807) 14 Ves. 160; *Re Denton's Estate*, [1904] 2 Ch. 178.

(*i*) *Steel v. Dixon*, (1881) 17 Ch. D. 825; cf. *Re Arcedekne*, (1883) 24 Ch. D. 709; *Berridge v. Berridge*, (1890) 44 Ch. D. 168.

him to the principal creditor, in excess of his own proper share, from the date when such payment was made (*k*).

Costs of action
by creditor.

A surety can only recover contribution from his co-sureties towards the costs of an action brought against him by the principal creditor, if he can show that in defending such action he acted prudently and reasonably (*l*), or if he can show that he was authorised by them to defend it (*m*).

Liability of the Principal Debtor to the Surety.

Express and
implied con-
tracts of
indemnity.

The right of a surety to sue the principal debtor for loss, incurred through a contract of guarantee entered into on the latter's behalf, may arise from an express contract of indemnity or from an implied one. If there exist an express contract of indemnity, then, in accordance with the maxim "*Expressum facit cessare tacitum*," an implied one will be negatived (*n*).

The right of a surety to an indemnity is in the nature of a simple contract debt, even though the debt guaranteed be a specialty debt—a contract under seal (*o*).

Extent of
debtor's lia-
bility to
surety.

No general rule can be laid down as to the limits of the principal debtor's liability to his surety, since the extent of the liability depends in each case upon the terms of the contract of indemnity (*p*), but it may be observed that under certain circumstances, *e.g.*, where special damage has been incurred, a surety may recover under a contract of indemnity a greater sum than the principal creditor could recover under the original contract (*q*).

A bail may recover from his principal all expenses reasonably incurred in securing the principal's surrender (*r*), but an agreement by an accused person to indemnify his bail is illegal and unenforceable (*s*).

Indemnity
may include
interest.

The right of a surety to a full indemnity carries with it a right to receive interest upon money paid on the debtor's behalf (*t*).

Where the obligation to indemnify exists only by virtue of a

(*k*) *Hitchman v. Stewart*, (1855) 3 Drew. 271; *Re Hunt*, (1902) 86 L. T. 504.

(*l*) *Tindall v. Bell*, (1843) 11 M. & W. 228; *Broom v. Hall*, (1859) 7 C. B. N. S. 503; *cf. Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Kemp v. Finden*, (1844) 12 M. & W. 421.

(*m*) *Cf. Knight v. Hughes*, (1828) 3 C. & P. 467; *Blyth v. Smith*, (1843) 5 M. & Gr. 405.

(*n*) *Cf. Hamlyn v. Wood*, [1891] 2 Q. B. 488; *Mills v. United Counties Bank Ltd.*, [1912] 1 Ch. 231.

(*o*) *Badeley v. Consolidated Bank*, (1886) 34 Ch. D. 536, at p. 556; *Ferguson v. Gibson*, (1872) L. R. 14 Eq. 379; *cf. Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), s. 5.

(*p*) *Cf. Ex parte Burrell*, (1875) 1 Ch. D. 537; *Ex parte Allard*, (1881) 16 Ch. D. 505; *Mills v. United Counties Bank, Ltd.*, *ubi supra*.

(*q*) *Badeley v. Consolidated Bank*, *ubi supra*, *per* Stirling, J., at p. 556.

(*r*) *Fisher v. Fallows*, (1804) 5 Esp. 171, *per* Lord Ellenborough; *cf.*, however, *Reason v. Wirdnam*, (1824) 1 C. & P. 434.

(*s*) *Consolidated Exploration Co. v. Musgrave*, [1900] 1 Ch. 37; *R. v. Porter* [1910] 1 K. B. 369, at p. 372.

(*t*) *Petre v. Duncombe*, (1851) 20 L. J. Q. B. 242, *per* Erle, C.J., at p. 244; *Re Fox, Walker & Co.*, (1880) 15 Ch. D. 400.

covenant, its extent is to be measured only by the words of the covenant, and there is no principle of equity that every joint covenant shall be construed as if it were joint and several (*u*). Construction of agreement.

In so far as a surety makes himself liable under a contract of guarantee to an extent greater than that of the principal debtor, his liability is not, properly speaking, one of suretyship at all.

It would appear that where there is an actual accrued debt, secured by a guarantee, and one of several co-sureties is liable and admits liability for the amount guaranteed, he has a right, in equity, to compel the principal debtor to relieve him from his liability by paying off the debt (*x*). This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor (*x*). Right of co-surety to compel principal debtor to relieve him of liability by payment of debt.

In equity, a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law (*y*). The plaintiff is not compelled to pay before seeking relief (*z*). If the surety takes a bond from the principal debtor, as security for the guaranteed debt, he may recover upon forfeiture of the bond, although he has not been damnified by being obliged to pay (*a*). Enforcement of contract of indemnity.

In such cases, *i.e.*, where the debtor has given to the surety a bond or has given to him an indemnity under seal, the surety should sue upon the bond or covenant, and should not sue for money paid to the debtor's use (*b*). If the terms of the bond expressly limit its operation to the granting of an indemnity, the surety must prove actual damage before he can recover under it (*c*).

In law, a surety is entitled, as soon, and as often, as he pays a portion of the guaranteed debt, to sue the principal debtor for reimbursement (*d*), but he is not entitled to pay off the whole debt before the due date of payment arrives (*e*). When indemnity can be claimed.

If the surety sues the principal debtor for reimbursement, the form of the action is for money paid to the defendant's use. (This form of action, of course, does not apply, in cases mentioned above, where the debtor has expressly covenanted with the surety to pay on a given day and has made default (*f*)). Form of action.

(*u*) *Sumner v. Powell*, (1816) 2 Mer. 30; cf., however, *Lee v. Nixon*, (1834) 3 N. & M. 441.

(*x*) *Ascherson v. Tredegar Dry Dock Co.*, [1909] 2 Ch. 401; cf. *Padwick v. Stanley*, (1852) 9 Hare, 627.

(*y*) *Johnston v. Salvage Association*, (1887) 19 Q. B. D. 458, per Lindley, L.J., at p. 460.

(*z*) *Johnston v. Salvage Association*, *ubi supra*, at p. 461; cf. *Lacey v. Hill*, (1874) L. R. 18 Eq. 182.

(*a*) *Toussaint v. Martinnant*, (1787) 2 T. R. 100, per Ashurst, J., at p. 104; cf. *Penny v. Foy*, (1828) 8 B. & C. 11.

(*b*) Cf. *Toussaint v. Martinnant*, *ubi supra*, at pp. 104 and 105.

(*c*) *Penny v. Foy*, (1828) 8 B. & C. 11, per Bayley, J., at p. 13.

(*d*) *Davies v. Humphreys*, (1840) 6 M. & W. 153. As to when a surety can sue a co-surety, *vide supra*, p. 157.

(*e*) Cf. *Coppin v. Gray*, (1842) 1 Y. & C. C. C. 205.

(*f*) Cf. *Loosemore v. Radford*, (1842) 9 M. & W. 657; *Toussaint v. Martinnant*, (1787) 2 T. R. 100.

What constitutes payment of debt.

Various decisions have been given as to what form of payment by the surety entitles him to indemnification. It would appear that the giving of a promissory note by the surety, which is accepted by the creditor, constitutes a payment (*g*), but the point is not free from doubt; and it has been decided that the substitution of one bond for another (*h*), or the mere giving of a bond by the surety (*i*), does not amount to a payment by him.

The payment of a sum of money by the surety to prevent the creditor from levying execution upon goods seized, or about to be seized, in satisfaction of the debt, entitles the surety to sue for money paid to the debtor's use (*j*); but there is some doubt as to whether the mere taking of the surety's goods in execution, without any payment by him, has the same effect (*k*).

In conclusion, it may be mentioned that there are one or two old decisions to the effect that a transfer of stock does not constitute a payment of money (*l*).

Rights of the Surety against the Principal Creditor.

When and how surety's rights accrue.

The rights of a surety against a principal creditor accrue to him at the date of, and by reason of, his entering into the contract of guarantee (*m*). Consequently, the right of a surety to the benefit of a collateral security is not, wholly, in abeyance till he is called on to pay (*n*).

A surety is entitled, at any time after the guaranteed debt has become due, to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and when he has paid it off, he is at once entitled in the creditor's name to sue the principal debtor (*o*). But, if the debtor makes default, the surety cannot compel the creditor to actually sue the debtor, unless he—the surety—both deposits the amount of the debt, and agrees to indemnify the creditor against the risk, delay, and expense involved (*p*).

(*g*) *Barclay v. Gooch*, (1797) 2 Esp. 571; *Rodgers v. Maw*, (1846) 15 M. & W. 444, at p. 449; *McKenna v. Harnett*, (1849) 13 Ir. L. R. 206; cf. *Re Roberts*, (1859) 3 De G. & J. 447; *Gore v. Gore*, [1901] 2 I. R. 269.

(*h*) *Ex parte Serjeant*, (1825) 2 Gl. & J. 23.

(*i*) *Taylor v. Higgins*, (1802) 3 East, 169; *Maxwell v. Jameson*, (1818) 2 B. & Ald. 51; see also *Soutten v. Soutten*, (1822) 5 B. & Ald. 852.

(*j*) *Exall v. Partridge*, (1799) 8 T. R. 308; cf. *Edmunds v. Wallingford*, (1885) 14 Q. B. D. 811.

(*k*) *Moore v. Pyrke*, (1809) 11 East, 52; cf. *Yates v. Eastwood*, (1831) 6 Ex. 805; cf., however, *Rodgers v. Maw*, (1846) 15 M. & W. 444, at p. 449; *Edmunds v. Wallingford*, *ubi supra*.

(*l*) *Nightingale v. Devisme*, (1770) 5 Burr. 2589; *Jones v. Brinley*, (1800) 1 East, 1.

(*m*) Cf. *Craythorne v. Swinburne*, (1807) 14 Ves. 160; *Dixon v. Steel*, [1901] 2 Ch. 602.

(*n*) *Dixon v. Steel*, *ubi supra*; cf., however, *Re Howe*, (1871) 25 L. T. 252, *per Mellish*, L.J., at p. 253.

(*o*) *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32, *per Smith*, L.J., at p. 75; [1894] A. C. 586.

(*p*) *Wright v. Simpson*, (1802) 6 Ves. 714, *per Lord Eldon*, at p. 734.

A surety has a right, at any time after the guaranteed debt has become due, to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal debtor in the creditor's name (*q*). If the surety obtain an actual assignment of the debt, it would appear that he may sue in his own name (*r*).

A surety, upon payment by him of the guaranteed debt, but not until then (*s*), is entitled to claim subrogation to all rights of the creditor, in respect of the debt or default to which the guarantee relates (*t*); and is entitled to claim the benefit of all securities which the creditor has received from the principal debtor (*u*), given at whatever time, and irrespective of whether he knew, or did not know, that they had been given, at the time when he became surety (*x*). Subrogation.

The surety, after payment, may also claim the benefit of all equities which the creditor, whose debt he paid off, could have enforced, not merely against the principal debtor, but also against all persons claiming under him (*y*).

SECTION III.

Insurance.

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Insurance.

The fundamental principle governing all contracts of insurance, with the exception of those relating to life and personal injury, is that the contract is one of indemnity, and of indemnity only (*z*). The assured is thus entitled to receive a full indemnity, but nothing beyond that (*z*). Contract of insurance generally a contract of indemnity.

Furthermore, in practice, most contracts of insurance are limited in amount, and with regard to the risks insured against; so that few policies of insurance guarantee to the assured a But may be qualified as to risk and amount of indemnity.

(*q*) *Swire v. Redman*, (1876) 1 Q. B. D. 536, per Cockburn, C.J., at p. 541; cf. *Padwick v. Stanley*, (1852) 9 Hare, 627.

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

(*s*) *Re Howe* (1871), 25 L. T. 252, per Mellish, L.J., at p. 253; cf. *Lake v. Brutton*, (1856) 8 De G. M. & G. 440.

(*t*) *Morgan v. Seymour*, (1637) 1 Rep. Ch. 64.

(*u*) *Duncan, Fox & Co. v. N. & S. Wales Bank*, (1880) 6 App. Cas. 1.

(*x*) Cf. *Forbes v. Jackson*, (1882) 19 Ch. D. 615, at p. 621; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

(*y*) *Drew v. Lockett*, (1863) 32 Beav. 499, per Lord Romilly; cf. *Imperial Bank v. London and St. Katharine Docks Co.*, (1877) 5 Ch. D. 195.

(*z*) *Castellain v. Preston*, (1883) 11 Q. B. D. 380, per Brett, L.J., at p. 386.

complete indemnity, under all circumstances, in respect of every conceivable loss (a).

Any loss, in respect of which an indemnity is claimed, must be shown to have arisen directly from a cause which is covered by the terms of the insurance policy (b).

Unvalued or
open policies.

If the insurer limits the amount up to which he agrees to insure, he does not, of course, except in the case of a "valued" policy, necessarily undertake to pay the whole amount named, even though the property insured be totally destroyed. His undertaking only amounts to an agreement to indemnify the assured against the loss actually suffered, to an amount not exceeding the sum named in the policy, and the assured may be called upon to strictly prove the extent of his actual loss.

Fire Insurance.

Legality of
policy.

"Valued" policies are rare, except in marine insurance, but there would appear to be no reason why the valuation given in a *bonâ fide* policy in respect of goods or merchandise—but not of houses (c)—should not be binding upon the parties. At common law, a contract of assurance is valid, even though made with persons having no interest at all in the property insured (d), and the provision in the Life Assurance Act, 1774 (e), which provides that no one may insure against the loss of anything, or the death of any person, in which, or in whom, he has not an interest, nor for more than the value of that interest, nor recover, on such insurance, more than the interest which he has, does not apply to *bonâ fide* policies effected upon goods, ships, or merchandise (e). But of course, even in the case of "valued" or other policies of any kind whatsoever, except those upon goods, ships, or merchandise, it is expressly provided by statute (f) that the assured must prove that he has some interest in the subject-matter; so that the effect of the valuation, in a "valued" policy, is merely to dispense with the necessity of proving the amount of loss incurred (g); and, in the case of a fire insurance upon goods, if the contract be, in reality, a gaming contract, it will be null and

(a) Cf. *Aitchison v. Lohre*, (1879) 4 App. Cas. 759, *per* Lord Blackburn, at pp. 761–764; *Hough v. Head*, (1886) 53 L. T. 809, *per* Bowen, L.J.

(b) Cf. *The Xantho*, (1887) 12 App. Cas. 503; *Thames and Mersey Insurance Co. v. Hamilton, Fraser & Co.*, (1887) 12 App. Cas. 484; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Sassoon v. Western Assurance Co.*, [1912] A. C. 561.

(c) 14 Geo. 3, c. 48, ss. 1 and 3.

(d) Cf. *Dalby v. India and London Life Assurance Co.*, (1855) 15 C. B. 365.

(e) 14 Geo. 3, c. 48, s. 4: cf. *Waters v. Monarch Life Assurance Co.*, (1856) 5 E. & B. 870, at pp. 877, 878.

(f) 14 Geo. 3, c. 48, s. 1; cf. Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 4 and 6; *Lewis v. Rucker*, (1761) 2 Burr. 1170.

(g) *Woodside v. Globe Insurance Co.*, [1896] 1 Q. B. 105; Marine Insurance Act, *ubi supra*, ss. 27 and 28.

void under the Gaming Act, 1845 (*h*), or, if it be not *bonâ fide*, it will be void under the Act of 1774 (*i*).

Furthermore, it is to be observed that, in the case of life insurance, or fire insurance upon houses or buildings, the interest of the assured in the subject-matter must exist at the date when the policy is entered into (*k*); whereas, in the case of marine insurance, although an interest is necessary, the assured's interest need only be acquired at some date prior to that when the loss was incurred (*l*) or became known (*l*).

In practice, however, most fire insurance policies are so framed that, in case of loss, the insurers are only liable to pay to the assured the actual cost of the property destroyed, or its estimated value at the date of its destruction. Failing agreement, such value is usually declared to be determinable by arbitration.

Fire insurance policies usually "open" policies.

Fire insurance policies usually contain a provision which enables the insurers, if they so desire, to "reinstate" (*m*), instead of paying to the assured the amount of his loss. In the case of ordinary merchandise, the expense incurred by the insurer would probably be identical whichever course was adopted, since ordinary merchandise can be replaced at the cost of its value. But it is to be observed that, where several parties have different interests in the same property, and, upon its destruction, the insurers pay to one party, as compensation, the cost of reinstatement, if the insurers have no power to insist upon such compensation being expended in reinstatement (*n*), they may be further mulcted in respect of loss incurred by other parties who have other interests in the same property (*n*). Furthermore, if the insurers, having power to elect under the terms of the policy whether they will reinstate or pay the value of the property destroyed, elect to reinstate, they cannot afterwards decide to pay the value (*o*).

Reinstatement.

In the case of old premises or machinery, it would appear that a fair criterion of the insurer's liability is to see what would be the expense of placing new buildings or machinery of the kind which existed before the fire, and to deduct from that expense the difference in value between the new and the old (*p*). In computing such difference in value, no fixed ratio, such as that

Old premises.

(*h*) 8 & 9 Vict. c. 109, s. 18.

(*i*) S. 4 and s. 1.

(*k*) 14 Geo. 3, c. 48, s. 1.

(*l*) 6 Edw. 7, c. 41, s. 6.

(*m*) As to meaning of reinstatement in the case of chattels, *vide Anderson v. Commercial Assurance Co.*, (1855) 55 L. J. Q. B. 146.

(*n*) *Westminster Fire Office v. Glasgow Provident Society*, (1888) 13 App. Cas. 699, 709. Cf. *Fires Prevention Act, 1774* (14 Geo. 3, c. 78), s. 83.

(*o*) *Brown v. Royal Insurance Co.*, (1859) 1 E. & E. 853; cf. *Clough v. L. & N. W. Ry. Co.*, (1871) L. R. 7 Exch. 26.

(*p*) *Vance v. Forster*, (1841) Ir. Circ. Cas. 47, *per Pennefather, B.*, at p. 51; cf. *Times Fire Assurance Co. v. Hawke*, (1859) 28 L. J. Ex. 317, *per Channell, B.*, at p. 318.

of "one third new for old," which obtains in the case of marine insurance policies, has been established, and each case must be considered on its own merits.

"Average clause."

Many fire insurance policies contain an "average clause" which places the policy, in this respect, upon the same footing as a marine policy (*q*).

Doctrine of "abandonment."

It would appear that the doctrine of "abandonment" applies to fire insurance, as well as to marine insurance (*r*). Consequently, as a matter of strict law, the insurer is, in all cases of fire insurance, entitled, upon payment of an absolute indemnity for total loss to the assured, to claim the right to all property in respect of which the indemnity is given, in order that he—the insurer—may lessen the loss resulting (*s*). But, apparently, the rule that the assured must give notice of abandonment, in order to recover for a total constructive loss, applies only to marine insurance policies (*t*).

Subrogation.

The principle of subrogation applies to fire insurance, in the same way that it applies to marine insurance, since in each of these two forms of insurance the contract which is entered into is one of indemnity (*u*).

Accordingly, the insurer, upon paying or making good the indemnity, is entitled to succeed to all the ways and means by which the assured might have protected himself against, or reimbursed himself for, the loss (*x*); but he must sue—if at all—in the name of the assured (*y*). Furthermore, if the insurer or indemnifier has already paid the indemnity, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, an equity arises that the person who has already paid the full indemnity is entitled to be recouped *pro tanto* (*z*).

Amount of indemnity unaffected by subrogation rights.

But it is to be observed that the amount of the indemnity, payable in the first instance, is not affected by the fact that there exists a possibility of something accruing later on to the assured, which may diminish the extent of the loss (*a*).

Thus, in cases where a person has insured his property against fire, and his property is destroyed under circumstances

(*q*) *Vide infra*, p. 181.

(*r*) *Kaltenbach v. Mackenzie*, (1878) 3 C. P. D. 467, *per* Brett, L.J., at p. 470.

(*s*) *Rankin v. Potter*, (1873) L. R. 6 H. L. 83, at p. 118.

(*t*) *Kaltenbach v. Mackenzie*, (1878) 3 C. P. D. 467, *per* Brett L.J., at pp. 471, 472.

(*u*) *Darrell v. Tibbitts*, (1880) 5 Q. B. D. 560. *Vide infra*, p. 184.

(*x*) *Simpson v. Thomson*, (1877) 3 App. Cas. 279, *per* Lord Cairns, at p. 284; cf. *King v. Victoria Insurance Co.*, [1896] A. C. 250.

(*y*) *Simpson v. Thomson*, *ubi supra*.

(*z*) *Burnand v. Rodocanachi*, (1882) 7 App. Cas. 333, *per* Lord Blackburn, at p. 339; cf. *Castellain v. Preston*, (1883) 11 Q. B. D. 380; *Assicurazioni Gen. de Trieste v. Empress Assurance Corporation*, [1907] 2 K. B. 814; Marine Insurance Act, 1906, s. 32.

(*a*) Cf. *Collingridge v. Royal Exchange Assurance Co.*, (1877) 3 Q. B. D. 173.

which entitle him to claim reimbursement from the local authorities under the Riot (Damages) Act, 1886 (*b*), the assured may demand payment from the insurance company of the full amount of the damage, and leave the company to reimburse itself by claiming from the local authorities in his name.

The insurers cannot, under the principle of subrogation, acquire any greater or higher rights than those possessed by the assured (*c*), and they do not acquire full and complete rights of subrogation, except upon payment of a complete indemnity in respect of the entire loss of the assured (*d*).

Payment of indemnity a condition precedent to subrogation.

Since a fire insurance policy is a contract of indemnity, the assured cannot recover more than the amount of his loss (*e*). Hence, if he is over-insured, through having effected several different policies in respect of the same interest in the same property, a right of contribution exists between the several insurers, similar to that which prevails between co-sureties (*f*).

Multiple or over-insurance.

When, however, different policies are effected to cover different interests in the same property, the principle of contribution does not apply (*g*), although the principle of subrogation, of course, obtains (*h*).

Bailees who have an interest in property, through being responsible for its safety, *e.g.*, common carriers or warehousemen, may insure such property to the full extent of its value (*i*). If, after insurance by a bailee, the property be destroyed, the bailee can recover the full value of the property, and can keep so much of the compensation as will cover his own interest in the property (*k*); for the residue of the compensation, the bailee is in the position of a trustee to the absolute owner (*l*).

Insurance by bailees.

Similarly, a mortgagor and a mortgagee can both insure the mortgaged property to its full value (*l*); but, if both recover full compensation, one insurer will have a remedy against the other (*l*).

Mortgagor and mortgagee.

The damage incurred in respect of which an indemnity is claimed under a policy of insurance must not be too remote. In other words, the proximate cause of the loss must be a peril which

Remoteness of loss.

(*b*) 49 & 50 Vict. c. 38.

(*c*) *Simpson v. Thomson*, (1877) 3 App. Cas. 279.

(*d*) Cf. *Commercial Union Assurance Co. v. Lister*, (1874) 9 Ch. App. 483; Marine Insurance Act, 1906, s. 79.

(*e*) Cf. *Reynard v. Arnold* (1875), L. R. 10 Ch. 386.

(*f*) *North British Insurance Co. v. London and Globe Insurance Co.*, (1877) 5 Ch. D. 569, *per James, L.J.*, at p. 581; *vide supra*, p. 156; cf. *Deering v. Winchelsea (Earl of)*, (1787) 2 B. & P. 270; Marine Insurance Act, 1906, ss. 32 and 80.

(*g*) *North British Insurance Co. v. London and Globe Insurance Co.*, *ubi supra*.

(*h*) Cf. Marine Insurance Act, 1906, ss. 32 and 79.

(*i*) *Crowley v. Cohen*, (1832) 3 B. & Ad. 478.

(*k*) *Waters v. Monarch Assurance Co.*, (1856) 5 E. & B. 870; *L. & N. W. Ry. Co. v. Glyn*, (1859) 1 E. & E. 652; cf. *North British Insurance Co. v. Moffatt*, (1871) L. R. 7 C. P. 25.

(*l*) *North British Insurance Co. v. London and Globe Insurance Co.*, (1877) 5 Ch. D. 569, at pp. 583 and 584.

was insured against(*m*); and, furthermore, the compensation claimed must not be in respect of a merely collateral benefit of which the assured has been deprived. Thus, loss of profits upon goods insured is deemed to be too remote a form of loss to be recoverable, unless it is specifically insured against(*n*); and the same rule applies to loss of rent (*o*).

Life Insurance—including Insurance against Personal Injury.

Contract of life insurance not a contract of indemnity.

Contracts of life insurance differ from contracts of fire or marine insurance in that they are not, and do not purport to be, contracts of indemnity, notwithstanding the provisions of the Life Assurance Act, 1774(*p*); though, as appears hereafter, the effect of that statute is far from being wholly nugatory in its operation upon life insurance policies. Since, therefore, life insurance policies are not contracts of indemnity, the principle of subrogation(*q*) has no application to them.

A life insurance policy has been defined as “a contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of his life, and, when once fixed, it is constant and invariable” (*r*).

Self-insurance.

Recovery by executors.

A man may, himself, insure his own life for any sum, and such sum may be recovered, upon his death, by his executors or representatives(*s*). It is immaterial whether the next of kin or legatees possessed any insurable interest in the life of the deceased, or not.

Necessity of possession of an insurable interest.

A contract of life insurance constitutes an aleatory contract. It is provided by the Gambling Act—otherwise called the Life Assurance Act(*t*)—that no insurance shall be made by any person on the life of another wherein the person for whose benefit such policy shall be made shall have no interest.

This Act, it may be observed, is of general application, and makes the possession of an interest a condition precedent to the making of an insurance upon any matter or subject whatever

(*m*) *Vide supra*, p. 162, *infra*, p. 171; cf. *Stanley v. Western Insurance Co.*, (1868) L. R. 3 Exch. 71, at p. 74.

(*n*) Cf. *Stockdale v. Dunlop*, (1840) 6 M. & W. 224, *per* Parke, B., at p. 232; *Re Wright and Pole*, (1834) 1 Ad. & El. 621; *Wilson v. Jones*, (1867), L. R. 2 Exch. 139.

(*o*) *Re Wright and Pole*, *ubi supra*.

(*p*) 14 Geo. 3, c. 48; cf. *Dalby v. India and London Life Assurance Co.*, (1854) 15 C. B. 365; overruling *Godsall v. Boldero*, (1807) 9 East, 72; see also *Law v. London Life Policy Co.*, (1855) 24 L. J. Ch. 196.

(*q*) *Vide* pp. 164 and 184.

(*r*) *Dalby v. India and London Life Assurance Co.*, *ubi supra*, *per* Parke, B., at p. 387; see also *Fryer v. Morland*, (1876) 3 Ch. D. 675, *per* Jessel, M.R., at p. 685.

(*s*) *Wainwright v. Bland*, (1835) 1 Moo. & R. 481, 487.

(*t*) 14 Geo. 3, c. 48, s. 1.

with the exception of *bonâ fide* policies upon ships, goods, and merchandise (*u*).

In the case of the latter, they would be null and void if they, in reality, constituted wagering contracts (*x*).

The Life Assurance Act, 1774, further provides that no one shall insure for, nor recover upon such insurance, an amount greater than the value of his interest in the life, or subject-matter, insured (*y*). But the amount which a person is entitled to insure by a policy on the life of another is the full value of his expectant benefit when it shall accrue, and not merely the present value of such benefit (*z*).

Insurance limited to extent of insurable interest.

The nature of the interest must be pecuniary (*a*). Thus, a father has no insurable interest in the life of his son, merely by reason of a parental relationship subsisting (*b*). But there is an exception in the case of an insurance by a husband on the life of his wife, or *vice versâ*, in which cases the existence of a pecuniary interest need not be proved (*c*).

Interest must be pecuniary.

As in the case of all other insurance policies, a claim under a life insurance policy must be shown to arise under the terms of the policy. If, therefore, the policy be one of insurance against death from accident, the death must be proved to have directly followed from an accident (*d*).

Limitation of risk.

Measure of Compensation.

In brief, it may be stated that the amount of compensation recoverable under a life insurance policy is the value or amount of the insurable interest at the time of the effecting of the policy (*e*); irrespective of whether the value, or amount, of such interest has been diminished, or increased, between the date of the policy and the death of the life insured (*f*).

Compensation recoverable limited to extent of insurable interest.

To this rule there are three exceptions or quasi-exceptions.

Exceptions to this rule.

- (1) A man may insure his own life to the extent of any amount, and his executors may recover such amount, upon his death (*g*).

(*u*) 14 Geo. 3, c. 48, s. 4. As to funeral expenses constituting an insurable interest, *vide* 9 Edw. 7, c. 49, s. 36.

(*x*) 8 & 9 Vict. c. 109, s. 18; cf. 14 Geo. 3, c. 48, s. 1; 6 Edw. 7, c. 41, ss. 4 and 6. *Vide supra*, p. 162.

(*y*) 14 Geo. 3, c. 48, s. 3.

(*z*) *Law v. London Life Policy Co.*, (1855) 24 L. J. Ch. 196.

(*a*) Cf. *Halford v. Kymer*, (1830) 10 B. & C. 724, at p. 728.

(*b*) Cf. *Att.-Gen. v. Murray*, [1904] 1 K. B. 165, *per* Cozens-Hardy, L.J., at p. 171.

(*c*) Cf. *Griffiths v. Fleming*, [1909] 1 K. B. 805, at pp. 820 and 821.

(*d*) Cf. *Isitt v. Railway Assurance Co.*, (1889) 22 Q. B. D. 504; *In re Etherington and L. & Y. Insurance Co.*, [1909] 1 K. B. 591.

(*e*) 14 Geo. 3, c. 48, s. 3.

(*f*) *Dalby v. India and London Insurance Co.*, (1854) 15 C. B. 365; cf. *Law v. London Life Policy Co.*, (1855) 24 L. J. Ch. 196.

(*g*) Cf. *Griffiths v. Fleming*, [1909] 1 K. B. 805, at pp. 820 and 821.

(2) A wife may insure her husband's life to the extent of any amount, and recover such amount, upon his death (*h*).

(3) A husband may insure his wife's life to the extent of any amount, and recover such amount, upon her death (*h*).

Multiple insurance.

If an assured insures, under life policies *sur autre vie*, the same interest, with several insurers, the amount recoverable, from all or any of such insurers, is limited to the amount of such interest; and, if that amount be recovered from one insurer, the others are not liable at all to the assured (*i*). Although, in such cases, the doctrine of subrogation does not apply, presumably, a right to contribution would exist (*j*).

No subrogation.

Insurance against injury.

Policies of insurance against personal injury arising from accident are, similarly, not contracts of indemnity (*k*). Consequently, the doctrine of subrogation does not apply. Hence, insurers cannot deduct from the compensation payable to the assured any sum recovered by him from other insurance companies, or from a tortfeasor (*l*).

Insurer has no rights either of subrogation or contribution.

An injured person may recover, under several different policies of insurance, several different sums as compensation. No question can be raised as to his insurable interest in his own well-being. Hence, an insurer against personal injury has no right either of subrogation or of contribution.

Assessment of compensation.

In the assessment of the sum due to the assured, under a policy of insurance against injury arising from accident, the factors of personal suffering, and permanent disablement, and expense incurred, have all to be considered. But, except in cases where the contrary is expressly provided, the assured is not entitled to claim in respect of consequences such as interference with his business or profession (*m*). Thus, the assessment rests upon a different basis from that which obtains in actions against a tortfeasor (*n*). Furthermore, it is to be noted that the damages are not to be calculated by considering what amount is payable upon death, and estimating what amount, short of such sum, would compensate the assured for the injury or disablement actually sustained (*o*). No proportion subsists between the two ratios.

(*h*) See note (*g*), p. 167, *ante*.

(*i*) *Hebdon v. West*, (1863) 3 B. & S. 579; cf. Marine Insurance Act, 1906, ss. 32 and 80.

(*j*) Cf. *Deering v. Winchelsea (Earl of)*, (1787) 2 B. & P. 270.

(*k*) *Theobald v. Railway Passengers Assurance Co.*, (1854) 10 Ex. 45, *per* Alderson, B., at p. 53.

(*l*) Cf. Railway Passengers Assurance Act, 1864 (27 & 28 Vict. c. 125), s. 35; Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7); *Bradburn v. G. W. Ry. Co.*, (1874) L. R. 10 Ex. 1.

(*m*) *Theobald v. Railway Passengers Assurance Co.*, (1854) 10 Ex. 45; cf. *Re Wright and Pole*, (1834) 1 Ad. & El. 621.

(*n*) *Vide infra*, pp. 195, 196.

(*o*) *Theobald v. Railway Passengers Assurance Co.*, *ubi supra*.

MARINE INSURANCE.

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Introductory.

The law relating to marine insurance is codified in the Marine Insurance Act, 1906 (*p*). By section 1 of that Act, a contract of marine insurance is defined as “a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.” Marine insurance defined.

There are several different varieties of insurance policies referred to in the above Act. Thus, there is the “valued” policy, which specifies the agreed value of the subject-matter insured (*q*); the “unvalued” or “open” policy, which does not specify the value of the subject-matter, but, subject to the limit of the sum insured, leaves the value to be subsequently ascertained (*r*); the “voyage” policy, which insures the subject-matter “at and from,” or merely “from,” one place to another or others (*s*); the “time” policy, which insures the subject-matter for a definite period of time (*s*); the “floating” policy, which describes the insurance in general terms, and leaves the name of the ship, or ships, and other particulars, to be defined by subsequent declaration (*t*). Different varieties of policies.

These terms are not all wholly separate and distinct. Thus, the same policy may be, at one and the same time, a “floating” and a “time” and a “voyage” policy (*u*).

It is provided by section 2 of the Act that a contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters, or on any land risk which may be incidental to any sea voyage; and it is provided, by section 3, that every “lawful marine adventure” may be the subject of a contract of marine

(*p*) 6 Edw. 7, c. 41.

(*q*) *Ibid.*, s. 27.

(*r*) *Ibid.*, s. 28.

(*s*) *Ibid.*, s. 25.

(*t*) *Ibid.*, s. 29.

(*u*) Cf. *Johnson v. Bryant*, (1896) 1 Com. Cas. 363.

insurance (*x*)—the meaning of a “marine adventure” being therein partially defined. But it is also enacted, by section 2, that, except as provided by section 2,—which section must be read in conjunction with section 3—nothing in the Marine Insurance Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as defined by that Act.

Assured must possess or acquire an insurable interest.

It is enacted by section 4 of the Act that a contract of marine insurance is void, where the assured has not an insurable interest, as defined by the Act, and the contract is entered into with no expectation of acquiring such interest.

Every one who is interested in a marine adventure has an insurable interest (*y*), as has also the possessor of a contingent, or defeasible, or partial interest (*z*).

But the assured need not be interested in the subject-matter insured at the time when the insurance is actually effected, provided that he acquire an interest prior to the date of the loss being incurred or becoming known (*a*).

Insurability of profits.

Profits do not constitute an insurable interest, unless the assured is the owner of the goods or has entered into a valid contract for their purchase (*b*). If the assured take out a valued policy on profits, that fact does not free him from the necessity of proving that, but for the loss of the goods, some actual profit would have accrued (*c*); and, as mentioned below, a contract of marine insurance is one of indemnity, so that, in an open policy, the compensation recoverable is strictly limited to the profits lost—irrespective of the amount for which they had been insured (*d*).

Insurance by a bailee.

A bailee, or carrier, who may be liable in damages for the safety of goods to a third party, has an insurable interest in them (*e*).

Marine insurance constitutes contract of indemnity.

A contract of marine insurance is a contract of indemnity (*f*); and it is provided by section 16 of the Act that, subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained in accordance with the provisions set out in that section (*g*).

(*x*) Cf. *Wilson v. Jones*, (1867) L. R. 2 Exch. 139.

(*y*) Marine Insurance Act, 1906, s. 5; as to meaning of “marine adventure.” *Vide* s. 3, and *Wilson v. Jones*, *ubi supra*.

(*z*) Marine Insurance Act, 1906, ss. 7 and 8.

(*a*) *Ibid.*, s. 6.

(*b*) *Stockdale v. Dunlop*, (1840) 6 M. & W. 224; cf. *Lucena v. Craufurd*, (1806) 2 B. & P. 269; *Moran, Galloway & Co. v. Uzzielli*, [1905] 2 K. B. 555, at pp. 560—562.

(*c*) Cf. *Hodgson v. Glover*, (1805) 6 East, 316; cf. also Marine Insurance Act, 1906, s. 4.

(*d*) Cf. *Eyre v. Glover*, (1812) 16 East, 218; Marine Insurance Act, 1906, s. 28.

(*e*) *Crowley v. Cohen*, (1832) 3 B. & Ad. 478; cf. *Hill v. Scott*, [1895] 2 Q. B. 713; *Waters v. Monarch Assurance Co.* (1856) 5 E. & B. 870; Marine Insurance Act, 1906, s. 5.

(*f*) *Ibid.*, s. 1.

(*g*) Cf. *Usher v. Noble*, (1810) 12 East, 639; *Winter v. Haldimand*, (1831) 2 B. & Ad. 649.

In contracts of marine insurance, as in other contracts of insurance, the assured can only claim compensation in respect of losses directly or proximately caused through those risks which have been insured against (*h*). Where several causes combine together to produce the loss incurred, it is to be observed that, speaking generally, the last cause, rather than a prior one, is to be regarded as the proximate cause or *causa causans* (*i*).

Remoteness
of loss.
Insured risks.

But, if the first cause suffice to produce a total loss, it is immaterial that subsequently other superimposed causes assist in completing such loss (*k*).

Furthermore, in an action by the owners of a ship—even including the master—on a policy of marine insurance, for loss proximately caused by one of the perils insured against, the fact that the loss arose through the negligent navigation of the master or the crew, not amounting to wilful negligence, affords no defence to the claim (*l*). Thus, the rights of a party, relying on an exception of sea perils, in a contract of carriage, may be very different from those of an assured claiming for a loss, by the like perils, under a policy of insurance (*l*).

Under a policy of marine insurance, the insurer cannot contend that the assured is estopped from claiming indemnity for loss, owing to his—the assured's—or his servants' negligence, unless such negligence was both wilful and the immediate cause of the loss (*m*).

As has been said, the loss incurred, to be recoverable, must not be too remote in character; thus, in a case where certain barges were insured against damage arising through collision, it was held that loss incurred, after collision in consequence of detention of the barges during repairs, was too remote a form of damage to be recovered under the policy (*n*).

Furthermore, where, in consequence of a collision between two ships, which are equally at fault, the owner of the less damaged ship is made to contribute his half-share towards the joint damage, he cannot recover from the insurer the amount paid in

(*h*) Marine Insurance Act, 1906, s. 55; cf. *Ionides v. Universal Marine Insurance Co.*, (1863) 14 C. B. N. S. 259; *Shelbourne & Co. v. Law Investment Corporation*, [1898] 2 Q. B. 626; *Oceanic Steamship Co. v. Faber*, (1907) 13 Com. Cas. 28; *Sassoon v. Western Assurance Co.* [1912] A. C. 561.

(*i*) Cf. *Hamilton v. Pandorf*, (1887) 12 App. Cas. 518, per Lord Halsbury, at p. 524; *Livie v. Janson*, (1810) 12 East, 648; *Davidson v. Burnand*, (1868) L. R. 4 C. P. 117.

(*k*) *Anderson v. Marten*, [1908] A. C. 334.

(*l*) *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114, at p. 126; cf. *Grill v. General Iron Screw Colliery Co.*, (1866) L. R. 1 C. P. 600, at p. 611; Marine Insurance Act, 1906, s. 55.

(*m*) Marine Insurance Act, 1906, s. 55; *Thompson v. Hopper*, (1858) E. B. & E. 1038; cf., however, Marine Insurance Act, 1906, s. 39.

(*n*) *Shelbourne v. Law Investment and Insurance Corporation*, [1898] 2 Q. B. 626; cf. *Field S.S. Co. v. Burr*, [1898] 1 Q. B. 821; [1899] 1 Q. B. 579.

excess of the actual damage to his ship(*o*), apart from any special modifying provision, contained in the policy of insurance, dealing with the question of collision or running down.

Measure of Damages.

Under a "valued" policy of insurance, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial(*p*). Under an unvalued policy, the full measure of indemnity is the insurable value of the subject-matter insured(*q*).

"Suing and labouring" clause.

But, in the case of either a "valued" or an unvalued policy, if there is a "suing and labouring" clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover, from the insurer, any expenses incurred pursuant to the clause(*r*), over and above the amount recoverable for partial or total loss of the insured subject-matter(*s*).

Where the assured is "under-insured."

Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance(*t*). Under such circumstances, the assured bears such portion of the loss as is proportional to the uninsured balance. Consequently, if, under a "valued" policy, the assured only insures for an amount less than the full value of the subject-matter, as fixed by the policy, he can recover from the insurer, in case of total loss, the full amount up to which he has actually insured, and can then retain out of the sum—if any—recovered, as damages, from the persons responsible for the loss, such proportion as is represented by the ratio of his uninsured amount, under the "valued" policy, to the total value as fixed by that policy(*u*).

In other words, where there is a loss recoverable under an insurance policy, the insurer is liable for such proportion of the full measure of indemnity as the amount of his subscription bears to the value fixed by the policy, in the case of a valued

(*o*) *De Vaux v. Salvador*, (1836) 4 A. & E. 420.

(*p*) Marine Insurance Act, 1906, ss. 27 and 68; cf. *Woodside v. Globe Insurance Co.*, [1896] 1 Q. B. 105.

(*q*) Marine Insurance Act, 1906, s. 68. As to determination of insurable value, *vide* s. 16.

(*r*) As to the expenses deemed to be incurred "pursuant" to such a clause, *vide* Marine Insurance Act, 1906, s. 78; *Xenos v. Fox*, (1869) L. R. 4 C. P. 665; *Dixon v. Whitworth*, (1879) 4 C. P. D. 371; *Cunard Steamship Co. v. Marten*, [1903] 2 K. B. 511; *Aitchison v. Lohre*, (1879) 4 App. Cas. 755, at pp. 764 and 765.

(*s*) Marine Insurance Act, 1906, s. 78; cf. *Lohre v. Aitchison*, (1878) 3 Q. B. D. 558, at p. 567, and the authorities quoted therein.

(*t*) Marine Insurance Act, 1906, s. 81.

(*u*) *The Welsh Girl*, (1906) 22 T. L. R. 475.

policy, or to the insurable value, in the case of an unvalued policy (x).

It is provided by the Marine Insurance Act, 1906, s. 32, that—
 “Where two or more policies are effected by, or on behalf of, the assured, on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over insured by double insurance.
 “Where the assured is over-insured by double insurance—

Double or
over-insur-
ance.

“(1) The assured may, unless the policy otherwise provides, claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

“(2) Where the policy under which the assured claims is a valued policy, the assured must give credit, as against the valuation, for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

“(3) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

“(4) Where the assured receives any sum in excess of the indemnity allowed by the Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.”

It is provided by the Marine Insurance Act, 1906, s. 80, that
 “where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt” (y).

Contribution
between
insurers.

It is to be noted that, where different policies are effected to cover different interests in the same property, the principle of contribution does not apply, since there is no double insurance in such cases (z); but, of course, the principle of subrogation applies (a).

Interest, upon the amount of indemnity due under a policy of insurance, is not recoverable (b), except by virtue of 3 & 4 Will. 4, c. 42, s. 29.

Interest.

Losses arising under marine insurance policies are of three kinds:—

Different
kinds of loss.

(1) Actual (or absolute or original) total loss.

(x) Marine Insurance Act, 1906, s. 67.

(y) *Vide supra*, p. 157; cf. *Deering v. Winchelsea (Earl of)*, (1787) 2 B. & P. 270.

(z) *North British Insurance Co. v. London and Globe Insurance Co.*, (1877) 5 Ch. D. 569.

(a) Cf. Marine Insurance Act, 1906, ss. 32 and 79.

(b) *Kingston v. McIntosh*, (1808) 1 Camp. 518.

(2) Constructive total loss.

(3) Partial loss.

It is provided by the Marine Insurance Act, 1906, s. 56, that—

“(1) Any loss, other than a total loss, as hereinafter defined, is a partial loss.

“(2) A total loss may be either an actual total, or a constructive total, loss.

“(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

“(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

“(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.”

Actual Total Loss of Ship or Goods.

Definition

There is an actual total loss where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof (*d*). In the case of an actual total loss, no notice of abandonment need be given (*e*).

It would appear that, except in the case of policies which are severable, or can be deemed to be such (*f*), no loss of insured goods can be regarded as “total,” unless, in fact, there is a total loss of all the goods (*f*).

Where a constructive total loss is an actual total loss without notice of abandonment being given.

A constructive total loss may be deemed to constitute an actual total loss, without any notice of abandonment being given (*g*), provided that—

(1) The derelict vessel and goods be sold under a salvage decree of a court of competent jurisdiction (*h*);

(2) The vessel and/or the goods be sold under justifiable circumstances (*i*) by the master of the ship, and the assured receive news of the damage and of the sale simultaneously (*i*).

(*d*) Marine Insurance Act, 1906, ss. 57 and 58; cf. *Cambridge v. Anderton*, (1824) 1 C. & P. 213; *Levy & Co. v. Merchants Insurance Co.*, (1885) 1 T. L. R. 228.

(*e*) Marine Insurance Act, 1906, s. 57.

(*f*) Cf. *Ralli v. Janson*, (1856) 6 E. & B. 422; *Duff v. Mackenzie*, (1857) 3 C. B. N. S. 16; *Wilkinson v. Hyde*, (1857) 3 C. B. N. S. 30; Marine Insurance Act, 1906, s. 76 (1).

(*g*) *Vide infra*, p. 175.

(*h*) *Cossmann v. West*, (1887) 13 App. Cas. 160.

(*i*) *Roux v. Salvador*, (1836) 3 Bing. N. C. 266; cf. *Kaltenbach v. Mackenzie*, (1878) 3 C. P. D. 467, per Cotton, L.J., at p. 480; *Navone v. Haddon*, (1850) 9 C. B. 30, per Maule, J., at p. 44.

Actual Total Loss of Freight.

Insured freight may be deemed to be the subject of an actual total loss where the assured is irretrievably deprived of the right to it (*k*). Definition.

Thus, if the marine adventure contemplated be frustrated, owing to delay caused by a peril insured against, there is an actual total loss of freight (*l*). There is, similarly, an actual total loss of freight where, by reason of the loss of the ship, such freight cannot be demanded from the consignors or consignees or charterers (*m*). Relevant determining factors.

But there is not a total loss of freight merely by reason of the fact that a ship has been so damaged that the cost of repair would exceed the value of the freight (*n*). The entire value of the ship and the freight together must be looked to in considering the question of total loss of freight (*n*).

Constructive Total Loss.

It is provided by the Marine Insurance Act, 1906, s. 60, that there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. The section also gives further particulars as to the determination of what constitutes a constructive total loss. Section 62 provides that, subject to and in accordance with the provisions enumerated in section 62 concerning notice of abandonment, the assured must give notice of abandonment to the insurer in cases where he—the assured—elects to abandon the subject-matter. If he fails to do so, the loss can only be treated as a partial loss. But notice of abandonment is declared by section 62 to be unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him. Definition.

Notice of abandonment.

In the case of a valued policy on ship, goods, or freight, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss (*o*).

It would appear to be probable that the provisions of the Marine Insurance Act, 1906, ss. 60—62, which make no reference Doctrine of ademption.

(*k*) Cf. Marine Insurance Act, 1906, s. 57.

(*l*) *In re Jamieson and Newcastle Insurance Association*, [1895] 2 Q. B. 90, *per* Lord Esher, M.R., at pp. 93 and 94.

(*m*) *Rankin v. Potter*, (1873) L. R. 6 H. L. 83; cf. *Wilson v. Forster*, (1815) 6 Taunt. 25.

(*n*) *Moss v. Smith*, (1850) 9 C. B. 94.

(*o*) Marine Insurance Act, 1906, s. 27 (4); cf. *Irving v. Manning*, (1847) 1 H. L. C. 287.

to the doctrine of "ademption,"—a doctrine which, at the date of the passing of the Act, was not recognised in the law of America or the Continent—will have the effect of abolishing that doctrine in the English courts. In other words, if, after the assured has given notice of abandonment, but before the commencement of action brought, the thing insured be restored under such circumstances and in such a state that the assured might, if he pleased, take possession of it, that fact will not necessarily, defeat his right to recover for a total loss. But the point has not yet been decided since the passing of the Act, and it is consequently uncertain (*p*).

Constructive Total Loss of Ship.

Determina-
tion of con-
structive total
loss.

In estimating the expenditure which must be incurred to preserve a damaged ship from actual total loss, it would appear that all the repairs, both temporary and permanent, required to make good the damage caused to the ship by the perils insured against, must be taken into account (*q*).

It is not necessary to exclude from such estimate repairs rendered necessary owing to the decayed state of the ship (*r*). Though, on the other hand, the repairs, the cost of which has to be considered, do not mean a reconstruction (*s*). Furthermore, in determining the question as to whether or not there has been a constructive total loss, no deduction of "one third new for old" is to be made from the estimated cost of repairs (*t*).

"Break-up
value" of
wreck.

There would appear to be some slight degree of doubt as to whether or not, in case of damage to an insured ship, the owner may, in support of a claim for a constructive total loss, add the break-up value of the wreck to the cost of repairing the damage, and thus maintain his claim by proving that the aggregate of both these sums would exceed the value of the ship when repaired (*u*). Sub-section 2 of section 60 of the Marine Insurance Act, 1906, certainly does not lend colour to any such contention, but there is a decision of high authority in favour of such contention upon the law as it stood prior to the passing of the Act (*x*). A recent decision declares that the break-up or unrepaired value of the wreck cannot be added (*y*).

"Loss of
voyage."

It is clearly established that "the loss of the voyage," in the

(*p*) Arnould on Marine Insurance (8th ed.), at pp. 1320—1324.

(*q*) *Phillips v. Nairne*, (1847) 4 C. B. 343; cf. *Agenoria Steamship Co. v. Merchants Marine Insurance Co.*, (1903) 8 Com. Cas. 212, at p. 217; *Blairmore Co. v. Macredie*, [1898] A. C. 593.

(*r*) *Phillips v. Nairne*, *ubi supra*.

(*s*) *North Atlantic Steamship Co. v. Burr*, (1904) 9 Com. Cas. 164.

(*t*) Cf. *Henderson Bros. v. Shankland & Co.*, [1896] 1 Q. B. 525.

(*u*) Arnould on Marine Insurance (8th ed.), Vol. II., at pp. 1353—1356.

(*x*) *Macbeth & Co. v. Maritime Insurance Co.*, [1908] A. C. 144.

(*y*) *Hall v. Hayman*, [1912] 2 K. B. 5.

course of which an insured ship is damaged, is wholly immaterial to the consideration of the question as to there being a constructive total loss of the ship or not (z).

Constructive Total Loss of Goods.

In contradistinction to the proposition just stated, it is to be noted that a contract of insurance upon goods to be carried by sea is a contract framed to protect the assured from the consequences of non-arrival of the goods in due course at the port of destination (a). Consequently, if the purpose of the voyage be wholly frustrated, through a peril insured against, there may be a constructive total loss of the goods intended to be carried, even though they be not wholly destroyed (b). On the other hand, if a portion of the goods can be preserved and conveyed to the port of destination, at a cost less than the value of such portion upon arrival at such destination, there cannot be a constructive total loss of the goods (c).

Purport of an insurance upon goods.

Determination of constructive total loss.

But all the extra expenses involved in preserving the cargo, consequent on the perils of the sea insured against, *e.g.*, of drying, landing, warehousing, and re-shipping, must be taken into account (d). The Marine Insurance Act, 1906, s. 60, enacts that there is a constructive total loss where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

In computing the cost of "forwarding" the goods, there is some degree of doubt as to whether the court should take into account the whole of the cost of transit, from the place of distress to the place of destination, which must have been incurred by the goods' owner if he had carried them on, or only the excess of cost over and above the cost which would have been incurred if no peril had intervened (e).

Constructive Total Loss of Freight.

In determining whether or not there has been a constructive total loss of insured freight, the same principles apply as those which govern other forms of constructive loss. Consequently, in accordance with section 62 (7) of the Marine Insurance Act, 1906, notice of abandonment is unnecessary where, at the time the

(z) *Pole v. Fitzgerald*, (1752) Willes, 641; *Parsons v. Scott*, (1810) 2 Taunt. 363; cf. *Doyle v. Dallas*, (1831) 1 Moo. & Rob. 48, per Lord Tenterden, at p. 55.

(a) *Vide* Arnould on Marine Insurance (8th ed.), at p. 1385.

(b) Cf. *Mansell v. Hoade*, (1903) 20 T. L. R. 150, per Walton, J.; *In re Jamieson and Newcastle Insurance Association*, [1895] 2 Q. B. 90, at pp. 93 and 94.

(c) *Rosetto v. Gurney*, (1851) 11 C. B. 176, per Jervis, C.J., at p. 190; cf. *Freeman v. East India Co.*, (1822) 5 B. & Ald. 617.

(d) Marine Insurance Act, 1906, s. 60 (2), (iii.); cf. *Farnworth v. Hyde*, (1866) L. R. 2 C. P. 204, at p. 225.

(e) *Vide* Arnould on Marine Insurance (8th ed.), at pp. 1387—1397.

Notice of
abandonment
usually
unnecessary.

assured received information of the loss, there would be no possibility of benefit to the insurer if notice were given to him (*f*). Thus, in practice, in most cases, notice of abandonment is unnecessary in the case of insured freight, since very serious damage to a ship usually completely frustrates the insured voyage; but it cannot be laid down as an absolute rule that notice of abandonment is never necessary in cases of constructive total loss of freight (*g*). It does not follow that there is a total loss of freight merely because the expense of repairing the damaged ship would exceed the value of the freight (*h*).

Partial Loss of Ship.

Measure of
indemnity.

It is provided by the Marine Insurance Act, s. 69, that "Where a ship is damaged but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

"(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

"(2) Where the ship has only been partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, as computed above.

"(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above."

"One third
new for old."

In cases where the damage has been repaired, the recognised method of calculating its amount is to deduct one-third from the total sum expended upon labour and materials, legitimately (*i*) employed for the purpose of repair, and to assess the damage at the figure represented by the remaining two-thirds (*j*).

Sale of ship
by owner.

If the damage to the ship has not actually been repaired, the only means of estimating its extent is by obtaining a surveyor's estimate. But, where the owner of the ship, which has sustained an average loss, instead of repairing, sells the ship, the

(*f*) *Vide supra*, p. 175.

(*g*) Cf. *Rankin v. Potter*, (1873) L. R. 6 H. L. 83, at pp. 99 and 100.

(*h*) Cf. *Moss v. Smith*, (1850) 9 C. B. 94.

(*i*) Cf. *Phillips v. Nairne*, (1847) 4 C. B. 343; *Agenorina Steamship Co. v. Merchants Marine Insurance Co.*, (1903) 8 Com. Cas. 212, at p. 217; *North Atlantic Steamship Co. v. Burr*, (1904) 9 Com. Cas. 164.

(*j*) *Da Costa v. Newenham*, (1788) 2 T. R. 407; *Lohre v. Aitchison*, (1877) 2 Q. B. D. 501; 3 Q. B. D. 558; cf. *Fenwick v. Robinson*, (1828) 3 C. & P. 323.

measure of compensation, which he can claim from the insurer, is the estimated cost of repair, less the usual deduction, not exceeding the depreciation in value of the ship, as ascertained by the sale(*k*).

It is provided by the Marine Insurance Act, 1906, s. 77, that, (1) unless the policy otherwise provides, and subject to the provisions of the Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured; (2) where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss; provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

Successive losses.

Partial loss followed by total loss.

Partial Loss of Freight.

It is provided by the Marine Insurance Act, 1906, s. 70, that, "subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy."

Measure of indemnity.

It is to be observed that, in open policies upon freight, the loss is adjusted on the gross, and not on the net, amount of freight(*l*), even though the effect of such adjustment may be to give to the assured more than an actual indemnity for the loss which he has sustained(*l*).

Furthermore, it is provided by the Marine Insurance Act, 1906, s. 16 (2), that, "in insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance."

Freight is generally insured in valued policies, and is calculated upon all the goods which the ship is intended to carry upon the voyage insured. But, if only a part of the full intended cargo is actually on board, so that less than the full freight would have been earned had no loss actually occurred, the assured can only claim such proportion of the sum insured as the portion of the cargo on board, or contracted for, at the time of the loss, bears to the full intended cargo(*m*). Similarly, where freight to a certain

(*k*) *Pitman v. Universal Marine Insurance Co.*, (1882) 9 Q. B. D. 192, per Cotton, L.J., at pp. 218 and 219; cf. *Bristol Steam Navigation Co. v. Indemnity Mutual Insurance Co.*, (1887) 57 L. T. 101.

(*l*) *Palmer v. Blackburn*, (1822) 1 Bing. 61; *United States Shipping Co. v. Empress Assurance Corporation*, [1907] 1 K. B. 259.

(*m*) *Forbes v. Aspinall*, (1811) 13 East, 323; *Denoon v. Home and Colonial Assurance Co.*, (1872) L. R. 7 C. P. 341; cf. *Forbes v. Cowie*, (1808) 1 Camp. 520.

amount has been paid in advance and is, therefore, not subject to risk, the amount recoverable by the assured is only such proportion of the amount insured as the freight, actually at risk, bears to the whole freight (*n*).

Partial Loss of Goods.

Measure of indemnity.

It is provided by the Marine Insurance Act, 1906, s. 71, that, "Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows :

"(1) Where part of the goods, merchandise, or other moveables insured by a valued policy, is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy :

"(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss :

"(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value :

"(4) 'Gross value' means the wholesale price, or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand ; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. 'Gross proceeds' means the actual price obtained at a sale where all charges on sale are paid by the sellers."

Where only a portion of the full intended cargo is actually on board, so that less than the full insured value is subject to risk, the rule of adjustment, in case of loss of, or damage to, such portion, is that the insurers shall be liable, in the case of a valued policy, for such proportion of the valuation in the policy as the goods lost or damaged bear to the full intended cargo (*o*) ; in the case of open policies, the insurers are liable for the proved value of the goods actually lost or damaged (*p*).

It is provided by the Marine Insurance Act, 1906, s. 72, that—

(*n*) *The Main*, [1894] P. 320.

(*o*) *Tobin v. Harford*, (1863) 13 C. B. N. S. 791.

(*p*) Cf. *Rickman v. Carstairs*, (1833) 5 B. & Ad. 651.

“(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species, in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by the Act.

Different species of property under a single valuation.

“(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.”

Apportionment of valuation.

It is to be observed that where only a part of an insured cargo is damaged, the fact that such damage has depreciated the selling value of the entire cargo, and, thus, the selling value of the uninjured portion, cannot be made the subject of an allowance for damage, over and above the damage to the portion of cargo physically injured (q).

Neither can expenses be recovered which were incurred in examining an uninjured portion of a partially damaged insured cargo (r).

Expenses incurred in examination of damaged cargo.

General Average.

A general average loss is defined by the Marine Insurance Act, 1906, s. 66, to be “a loss caused by or directly consequential (s) on a general average act.” The same section also provides that “there is a general average act where any extraordinary sacrifice or expenditure (t) is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure” (u).

General average loss.

It further provides that “where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.”

Right to contribution.

But the right to claim contribution for a general average loss is defeated in cases where the peril, which gave rise to the claim, was occasioned by the fault of the claimant, or his servants or

(q) *Cator v. G. W. Insurance Co.*, (1873) L. R. 8 C. P. 552; cf. *Brown Bros. v. Fleming*, (1902) 7 Com. Cas. 245.

(r) *Lysaght, Ltd. v. Coleman*, [1895] 1 Q. B. 49.

(s) Cf. *Achard v. Ring*, (1874) 31 L. T. 647; *Whitecross Wire Co. v. Savill*, (1882) 8 Q. B. D. 653; *Papayanni v. Grampian S.S. Co.*, (1896) 1 Com. Cas. 448.

(t) As to what constitutes a general average expenditure, cf. *Svensden v. Wallace*, (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404; *Atwood v. Sellar*, (1880) 4 Q. B. D. 342; 5 Q. B. D. 286; *The Bona*, [1895] P. 125; *Hamel v. P. & O. Steam Nav. Co.*, [1908] 2 K. B. 298.

(u) Cf. *Iredale v. China Traders Insurance Co.*, [1900] 2 Q. B. 515, at p. 519.

agents (*v*). On the other hand, a claim for contribution is not defeated by the mere fact that the necessity for the sacrifice arose through the inherent vice of property on board belonging to the claimant, unless the very fact of such property being shipped by him constituted negligence (*x*).

But, if the contract of carriage exempts the shipowner from liability for negligence, a claim by him for contribution is not defeated by proof of negligence on the part of him or his servants (*y*). Furthermore, although a wrong-doer's claim to contribution may be defeated by proof of negligence or default on his part, such default does not preclude other innocent claimants from obtaining contribution (*z*).

Exception in the case of jettisoned deck cargo.

To the general rule, above stated, as to the right to claim contribution towards a general average loss from the parties interested, there is one important exception, namely, deck cargo jettisoned is not entitled to general average contribution (*a*), unless the cargo is properly carried in accordance with a custom to that effect (*b*), or unless, in the case of a chartered ship, the shipper and the charterer are the same (*c*), or unless the parties interested, from whom contribution is sought, have expressly or impliedly agreed to contribute (*d*).

Distinction between general and particular average loss.

A general average loss differs from a particular average loss in that the latter is not incurred for the common safety of the parties interested in the marine adventure, and gives rise to no claim for contribution (*e*).

General average adjustment—amount of contribution.

In the process of general average adjustment, the extent of an owner's general average contribution is determined on the following basis: the value of the property to its owners, as saved by the sacrifice or expenditure, is the value upon the footing of which it ought to contribute towards making good the loss (*f*).

Estimation of value of property saved.

Ship, freight and goods contribute upon the value finally saved out of what was at risk at the time of the sacrifice or expenditure (*g*).

In the case of goods, the value is determined as at the place and time of adjustment, after deducting freight, duty and expenses of landing. Usually the place of adjustment is the port of destination (*g*).

(*v*) *Schloss v. Heriot*, (1863) 14 C. B. N. S. 59; *The Ettrick*, (1881) 6 P. D. 127, at pp. 135 and 137.

(*x*) *Greenshields, Cowie & Co. v. Stephens & Sons*, [1908] 1 K. B. 51; [1908] A. C. 431.

(*y*) *The Carron Park*, (1890) 15 P. D. 203; cf. *Milburn v. Jamaica Fruit, etc., Co.*, [1900] 2 Q. B. 540.

(*z*) *Strang v. Scott*, (1889) 14 App. Cas. 601.

(*a*) *Wright v. Marwood*, (1881) 7 Q. B. D. 62, at p. 67; cf. *Royal Exchange Co. v. Dixon*, (1886) 12 App. Cas. 11.

(*b*) *Gould v. Oliver*, (1837) 4 Bing. N. C. 135.

(*c*) Cf. *Burton & Co. v. English & Co.*, (1883) 12 Q. B. D. 218.

(*d*) *Johnson v. Chapman*, (1865) 19 C. B. N. S. 563.

(*e*) Cf. *Nesbitt v. Lushington*, (1792) 4 T. R. 783.

(*f*) *Arnould on Marine Insurance* (8th ed.), at p. 1180.

(*g*) *Ibid.*, at p. 1188.

In the case of a ship, this is not usually sold at the actual port of destination, and the assessment of its value is a matter of some difficulty (*h*). Where it is sold, the price realised is *prima facie* evidence of its contributory value (*i*), but in the case of ships of peculiar build such price is not necessarily conclusive (*k*).

It has been held that, where a ship having sustained damage in a storm, as a result of which it became necessary in order to save the ship and cargo to make a general average sacrifice, in consequence of which the ship became a constructive total loss and was sold as such, the proper mode of ascertaining the amount of the shipowner's loss, by the general average sacrifice, is to take the difference between the value of the ship undamaged and the estimated cost of repairing the particular average damage, and to deduct therefrom the proceeds of the sale of the ship—no deduction being made of “one third new for old” from the estimated cost of repairs (*l*).

Liability of Insurer for General Average Loss.

It is provided by the Marine Insurance Act, 1906, s. 66, that, “subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.”

It will thus be observed that the Act draws a distinction between the primary liability of the insurer in the case of a “general average expenditure” and in the case of a “general average sacrifice” (*m*).

Difference in primary liability for “expenditure” and for “sacrifice.”

The section further provides that, “subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

“In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against. Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer, in respect of general average losses or contributions, is to be determined as if those subjects were owned by different persons.”

Contribution must arise out of loss incurred in avoiding an insured risk.

(*h*) Arnould on Marine Insurance (8th ed.), at p. 1182.

(*i*) *Bell v. Smith* (1806), 2 Johnson, R. 98.

(*k*) *Cf. Grainger v. Martin* (1862), 31 L. J. Q. B. 186.

(*l*) *Henderson Bros. v. Shankland & Co.* [1896] 1 Q. B. 525.

(*m*) *Cf. The Mary Thomas*, [1894] P. 108, and *Dickenson v. Jardine*, (1868) L. R. 3 C. P. 639. Arnould on Marine Insurance (18th ed.), at p. 1133.

Where several contributing interests are owned by same assured.

But it is to be noted that, in the case of a general average sacrifice, where two or more of the contributing interests are owned by the same assured, the latter must deduct from the amount claimed, in respect of the sacrifice, the proportionate contribution payable in respect of his other interests (*n*). The reason of this is that the assured is deemed, in such cases, to have the contribution, as it were, in his pocket, and thus cannot collect from the insurer a sum of money to be recovered back by the insurer of himself (*n*).

Measure of indemnity for contribution.

It is provided by the Marine Insurance Act, 1906, s. 73, that, "subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss, which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute. Where the insurer is liable for salvage charges, the extent of his liability must be determined on the like principle.'

Contributory value cannot exceed policy value.

It is to be observed that, in accordance with this provision, as against the underwriters, contributory value cannot exceed the valuation in the policy (*o*). Another way of illustrating the same principle is to say that "whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but, for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured" (*p*).

Subrogation.

Since a marine insurance policy is, in principle, one of indemnity (*q*)—though, in its operation, it does not always conform to that principle (*r*)—it follows that the principle of subrogation applies to it.

(*n*) Arnould on Marine Insurance (8th ed.), at pp. 1171—1173; *Montgomery v. Indemnity Mutual Marine Insurance Co.*, [1902] 1 K. B. 734, at pp. 741 and 742.

(*o*) Cf. *SS. Balmoral Co. v. Marten*, [1902] A. C. 511.

(*p*) Arnould on Marine Insurance (8th ed.), at p. 1211; cf. *Anderson v. Ocean S.S. Co.*, (1884) 10 App. Cas. 107.

(*q*) Marine Insurance Act, 1906, s. 1; cf. *Castellain v. Preston*, (1883) 11 Q. B. D. 380, at p. 386.

(*r*) Cf. *Irving v. Manning*, (1847) 1 H. L. C. 287, at p. 307; *United States Shipping Co. v. Empress Assurance Corporation*, [1907] 1 K. B. 259.

It is provided by the Marine Insurance Act, 1906, s. 79, that “where the insurer pays for a total loss either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in, and in respect of, that subject-matter, as from the time of the casualty causing the loss(s). Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in, and in respect of, the subject-matter insured, as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.”

Total loss.

Partial loss.

It would appear that where restitution is made to the assured by a tortfeasor, the mere fact that the return was an act of grace, or a gift, will not disentitle the insurers from claiming the benefit of the return, provided such return was, in fact, intended by the person, or persons, who made it, to be a restoration of property seized or damaged (*t*). But the assured is not trustee for the insurer of any sum so paid to him in restitution, nor is he liable to pay interest upon it while it remains in his hands (*u*).

Restitution by a tortfeasor.

Furthermore, the insurer can only claim the benefit to which the assured is entitled in respect of the thing to which the contract of insurance relates, and thus, if the ship and freight be separately insured, the insurer of the ship cannot claim damages paid to the assured for loss of freight, either under the principle of subrogation or as salvage (*x*).

Subrogation rights limited to subject-matter actually insured.

The principle of subrogation has no application in cases where the insurer is made fully aware beforehand that the assured will by trade custom, or otherwise, have no right of action against third parties (*y*).

Exception to general principle.

If the same property is insured with different insurers, by persons having different interests in it, the rights and liabilities of the insurers *inter se* are determined by the joint application of the two principles of subrogation and contribution (*z*).

Multiple insurance of same property by different parties.

It is to be observed that the insurer does not acquire his

Rights only acquired after payment of loss.

(*s*) *Simpson v. Thomson*, (1877) 3 App. Cas. 279, at p. 284; *Burnand v. Rodocanachi*, (1882) 7 App. Cas. 333, at p. 339; *Castellain v. Preston*, (1883) 11 Q. B. D. 380; cf. *North of England Insurance Association v. Armstrong*, (1870) L. R. 5 Q. B. 244; *The Commonwealth*, [1907] P. 216; *The Charlotte*, [1908] P. 206.

(*t*) *Stearns v. Village Main Reef Gold Mining Co.*, (1905) 10 Com. Cas. 89, per Vaughan Williams, L.J., at p. 94; cf. *Burnand v. Rodocanachi*, (1882) 7 App. Cas. 333.

(*u*) *Stearns v. Village Main Reef Gold Mining Co.*, *ubi supra*.

(*x*) *Sea Insurance Co. v. Hadden*, (1884) 13 Q. B. D. 706.

(*y*) Cf. *Tate v. Hyslop*, (1885) 15 Q. B. D. 368.

(*z*) Cf. *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, (1877) 5 Ch. D. 569, at pp. 583 and 584.

subrogation rights until he has actually paid to the assured the amount of his entire loss, total or partial (*a*); so that if the assured is his own insurer in respect of part of his loss (*b*), he is at liberty, provided he acts in a *bonâ fide* manner, to settle claims in respect of the loss between himself and a third party (*c*).

Rights upon
abandonment.

Finally, it may be noted that the insurer, in case of abandonment by the assured of a constructive total loss, becomes entitled to the benefit of the subject-matter, whether ship, goods, or freight, and what is earned by it after the date of the casualty (*d*) as salvage.

Return of
premium.

The rules as to the return of the premium paid by an assured under a policy of marine insurance, and the enforcement of such return, in cases where there has been a failure of consideration, and in cases where the premium is returnable by agreement, are set out in the Marine Insurance Act, 1906, ss. 82—84.

(*a*) Marine Insurance Act, 1906, s. 79.

(*b*) Cf. Marine Insurance Act, 1906, s. 81; *The Welsh Girl*, (1906) 22 T. L. R. 475.

(*c*) *Commercial Union Assurance Co. v. Lister*, (1874) 9 Ch. App. 483.

(*d*) Marine Insurance Act, 1906, ss. 63 and 79; cf. *Roux v. Salvador*, (1836) 3 Bing. N. C. 266, at p. 288; *Green v. Royal Exchange Assurance Co.*, (1815) 6 Taunt. 68, at p. 72; *Sharp v. Gladstone*, (1805) 7 East, 24; cf., however, *Sea Insurance Co. v. Hadden*, (1884) 13 Q. B. D. 706.

CHAPTER VIII.

Bills of Exchange and other Negotiable Instruments.

IN the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which codified the law relating to bills of exchange as it existed at the date of the Act, there is one section which deals expressly with the subject of damages—section 57.

Bills of
Exchange
Act, 1882.

Section 57 reads thus:—

“Where a bill is dishonoured (*a*), the measure of damages, which shall be deemed to be liquidated damages (*b*), shall be as follows :

Measure of
damages
recoverable
from parties
to a dis-
honoured bill.

“(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

“(a) The amount of the bill :

“(b) Interest thereon from the time of presentment for payment if the bill is payable on demand (*c*), and from the maturity of the bill in any other case (*d*) :

“(c) The expenses of noting, or, when protest is necessary (*e*), and the protest has been extended, the expenses of protest.

“(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

Re-exchange.

“(3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part (*f*), and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper” (*g*).

Discretion as
to interest.

(a) Cf. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 43 and 47.

(b) *Vide* Ord. III., r. 6, and Ord. XIV., R. S. C. ; cf. *London and Universal Bank v. Clancarty*, [1892] 1 Q. B. 689 ; *Lawrence v. Wilcocks*, [1892] 1 Q. B. 696 ; *Dando v. Boden*, [1893] 1 Q. B. 318. *Vide supra*, p. 4.

(c) *Re East of England Banking Co.*, (1868) L. R. 4 Ch. 14 ; cf. *Pierce v. Fothergill*, (1835) 2 Bing. N. C. 167 ; *Blaney v. Hendricks*, (1771) 2 Bla. 761.

(d) *Laing v. Stone*, (1828) 2 M. & Ry. 562.

(e) Cf. Bills of Exchange Act, 1882, s. 51 (2).

(f) Cf. *Webster v. British Empire Co.*, (1880) 15 Ch. D. 169, *per* Cotton, L.J., at pp. 175, 176.

(g) *Keene v. Keene*, (1857) 3 C. B. N. S. 144 ; cf. *Cameron v. Smith*, (1819) 2 B. & Ald. 305.

Promissory notes.

The provisions of the above section are declared by section 89 to be equally applicable—*mutatis mutandis*—to promissory notes.

Guarantor's liability to pay interest.

It should be observed that, in addition to the liability of the parties to a bill or note set out in s. 57 of the Bills of Exchange Act, 1882, a guarantor of a bill or note is liable for interest in addition to principal (*h*).

Recovery of interest.

As has already been seen, interest upon bills of exchange and promissory notes is by custom always allowed (*i*).

It is to be noted that in cases where interest is not expressly reserved, its allowance is to be regarded in the light of damages for detention (*j*). Nevertheless, the court would not seem to be justified in withholding it, except on the ground of negligence or default on the holder's part (*k*), or special circumstances (*j*).

The plaintiff must produce the bill at the trial in order to entitle himself to interest prior to the date of the writ (*l*), except, perhaps, in cases where judgment is entered in default (*m*).

Interest reserved forms part of debt.

Where a bill is expressed to be payable with interest, such interest must be deemed to constitute part of the original debt (*n*). Therefore, it would appear that, in accordance with s. 57, in estimating the amount of interest to be awarded as damages upon a bill made expressly payable with interest, the interest must be calculated upon a sum representing:—

(1) the initial amount of the bill;

(2) interest upon the initial amount from the date of the bill—or if undated from the date of issue (*o*)—until maturity.

Compound interest?

Thus, compound interest is seemingly in such cases partially recoverable. But the matter is not free from doubt (*p*).

Date from which interest is to be calculated.

As has just been stated, where interest has been expressly reserved, the date from which it is to be calculated is the date of the bill (*q*). It is to be noted that such interest may be recovered in spite of the fact that in the first instance no action upon the bill could have been maintained owing to disability on the part of the holder (*r*).

On the other hand, in a case where no interest was expressly reserved, and the bill became due after the holder's decease

(*h*) *Ackermann v. Ehrensperger*, (1846) 16 M. & W. 99.

(*i*) *Vide supra*, pp. 27, 28.

(*j*) *Du Belloix v. Waterpark (Lord)*, (1822) 1 D. & R. 16.

(*k*) *Webster v. British Empire Co.*, (1880) 15 Ch. D. 169, *per* Cotton, L.J., at pp. 175, 176.

(*l*) *Hutton v. Ward*, (1850) 15 Q. B. 26.

(*m*) *Cf. Davis v. Barker*, (1846) 3 C. B. 606; R. S. C., Ord. XIII., r. 3.

(*n*) *Watkins v. Morgan*, (1834) 6 C. & P. 661; *cf. Florence v. Drayson*, (1857) 1 C. B. N. S. 584.

(*o*) *Cf. Bills of Exchange Act*, (1882) s. 9 (3).

(*p*) *Vide Byles on Bills* (16th ed.), at p. 440.

(*q*) *Cf. Bills of Exchange Act*, 1882, s. 9 (3); *cf. Roffey v. Greenwell*, (1839) 10 A. & E. 222.

(*r*) *Richards v. Richards*, (1831) 2 B. & Ad. 447.

intestate, but before administration of the holder's estate, it was decided that the date from which interest was to be calculated was the date of demand by the administrator—not the date of maturity of the bill (*s*).

Where the bill or note is payable on demand, but is not made expressly payable with interest, the date from which interest is calculated is the date of demand. In all other cases the date from which interest is to be calculated is the date of maturity of the bill (*t*).

It has been held that the indorser or drawer of a bill on which interest is not expressly reserved is not liable to pay interest until he receives notice of dishonour (*u*). Probably, however, this decision must be regarded as rescinded by s. 57 of the Bills of Exchange Act, 1882.

In the case of a note payable by instalments, but with a proviso to the effect that the whole amount shall become due upon non-payment of any instalment, the date from which interest is to be calculated upon the total amount unpaid, in the event of default in the payment of any instalment, is the date of such default (*y*).

Interest on bill payable by instalments.

Interest may be claimed in the writ, and is to be calculated, to the date of final judgment (*z*), except in the case of tender (*a*), when interest will cease to run after the date thereof. Where interest is reserved upon the bill or other instrument, and money is paid into court, the amount so paid must comprise interest to the date of such payment (*b*).

Date to which interest may be recovered.

Formerly, in an action for conversion of a bill or note, interest as damages could only be claimed down to the date of conversion (*c*), but now, by virtue of 3 & 4 Will. 4, c. 42, s. 29, interest may be awarded as damages in respect of loss accruing to the plaintiff subsequently to the date of conversion. Interest may therefore be awarded down to the date of verdict, but, of course, the plaintiff cannot sue for it in a specially indorsed writ (*d*).

Conversion.

The English rate of interest upon bills and other instruments at law and in equity is 5 per cent. (*e*). The determining factor as to the rate of interest allowable as damages is the place according

Rate of interest.

(*s*) *Murray v. East India Co.*, (1821) 5 B. & Ald. 204; cf. Bills of Exchange Act, 1882, s. 57 (1) and (3).

(*t*) *Vide supra*, p. 187.

(*u*) *Walker v. Barnes*, (1813) 5 Taunt. 240.

(*y*) *Blake v. Lawrence*, (1802) 4 Esp. 147.

(*z*) *Robinson v. Bland*, (1760) 2 Burr. 1081; cf., *London & Universal Bank v. Clancarty* [1892] 1 Q. B. 689. *Vide supra*, pp. 31, 36.

(*a*) *Dent v. Dunn*, (1813) 3 Camp. 296.

(*b*) *Kidd v. Walker*, (1831) 2 B. & Ad. 705.

(*c*) *Mercer v. Jones*, (1813) 3 Camp. 477; cf., however, *Paine v. Pritchard*, (1827) 2 C. & P. 558.

(*d*) *Vide supra*, p. 32.

(*e*) *Upton v. Ferrers*, (1801) 5 Ves. 803. *Vide supra*, p. 32.

to whose laws the bill is payable (*f*). It is the jury's function to declare what is the current rate of interest at any particular place, and it is the judge's function to direct the jury as to the place whose laws shall govern the instrument (*g*).

As has already been seen (*h*), interest expressly reserved is not to be regarded as being in the nature of damages, but as constituting part of the original debt.

Where interest is expressly reserved, but the rate is not specified, it is submitted that such rate would have to be determined by the court in accordance with the above rules laid down with regard to interest not specially reserved (*i*).

Conflict of laws.

It would be outside the scope of this work to discuss the terms of section 72 of the Bills of Exchange Act, 1882, which deals with the question of conflict of laws. Suffice it to say that the different parties to a bill or note may each be subject to a different *lex loci contractus*, and may thereby on the same bill incur different liabilities. Hence, one party, if sued, might be compelled to pay interest as damages at a different rate from another party (*j*).

Re-exchange.

Re-exchange is the measure of damages which accrue to the holder of a bill or note who has contracted for the transfer of funds from one country to another and, by reason of the bill's dishonour, has been compelled to obtain funds in the country where the bill was payable (*k*).

Re-exchange may thus (apart from the item as to expenses (*vide infra*)) be beneficial (*l*) or detrimental (*m*) to the party liable upon the bill, according to the variation in the rate of exchange between the two countries.

The drawer (*n*), indorser (*o*), and acceptor (*p*) are each respectively liable in case of default on the acceptor's part.

Sub-sections 1 and 2 of section 57 of the Bills of Exchange Act, 1882, are not to be read as affording alternative remedies (*q*) to the holder of a bill which is subject to re-exchange.

In appropriate circumstances, the holder of a bill may recover damages in respect of a circuitous course of exchange between two countries (*r*).

The obligations upon a bill subject to re-exchange, as

(*f*) Cf. Bills of Exchange Act, 1882, s. 72; *Cooper v. Waldegrave*, (1840) 2 Beav. 282.

(*g*) *Gibbs v. Fremont*, (1853) 9 Exch. 25.

(*h*) *Vide supra*, p. 188.

(*i*) Cf. *Allen v. Kemble*, (1848) 6 Moo. P. C. 314, at p. 322; 2 Kent, Com. 460.

(*j*) *Vide Cooper v. Waldegrave*, (1840) 2 Beav. 282.

(*k*) Cf. *Willans v. Ayers*, (1877) 3 App. Cas. 133.

(*l*) *Suse v. Pompe*, (1860) 8 C. B. N. S. 538.

(*m*) *De Tastet v. Baring*, (1809) 2 Camp. 65.

(*n*) *Mellish v. Simeon*, (1794) 2 H. Bl. 378.

(*o*) *Auriol v. Thomas*, (1787) 2 T. R. 52.

(*p*) *Walker v. Hamilton*, (1860) 1 D. F. & J. 602; *Ex parte Roberts*, (1886) 18 Q. B. D. 286; cf. Bills of Exchange Act, 1882, s. 57.

(*q*) *Re Commercial Bank of South Australia*, (1887) 36 Ch. D. 522.

(*r*) *Pollard v. Herries*, (1803) 3 B. & P. 335.

interpreted by the law merchant, cannot be affected by any custom among London merchants (*s*). Where, however, a fixed rate is allowed by the law of the country where the bill is dishonoured as damages on account of dishonour, such damages may be recovered in England (*t*).

When a foreign bill—appearing on its face to be such—is dishonoured wholly or in part, it is necessary, according to the law merchant, that the dishonour should be attested by a protest in order to charge the drawer and indorsers (*u*). Protest of bill.

But, so far as the law of this country is concerned, protest is unnecessary upon a foreign promissory note. It is similarly unnecessary upon a bill which, though foreign in reality, is not so upon the face of it (*x*).

Protest of an inland bill is unnecessary (*y*).

Damages not necessarily arising from the dishonour of a bill, *e.g.*, expenses of protest, noting, postage, or telegraphing, must be specially pleaded (*z*). It is doubtful whether other charges except those for protest or noting are to be deemed liquidated within section 57 of the Bills of Exchange Act, 1882 (*a*). Recovery of expenses in case of dishonour.

The expenses of postage have been held to be recoverable under a count for money paid (*b*).

An indorser who has been sued upon a bill cannot recover from the acceptor the costs of such suit (*c*). Recovery of costs of former action on bill.

It is submitted that this principle would apply generally to all parties to a bill. Neither can an indorser recover re-exchange from a defaulting acceptor (*d*) at common law, but now by statute he can (*e*).

But the acceptor of an accommodation bill—properly so called (*f*)—may, if sued upon the bill, recover from the drawer the costs of such action (*g*), unless the acceptor was unjustified in defending the action, in which case he cannot recover (*h*).

(*s*) *Suse v. Pompe*, (1860) 8 C. B. N. S. 538.

(*t*) *Ex parte Roberts*, (1886) 18 Q. B. D. 286.

(*u*) *Gale v. Walsh*, (1793) 5 T. R. 239; 2 R. R. 580; *Orr v. Maginnis*, (1806) 7 East, 359; 3 Smith, 328; cf. Bills of Exchange Act, 1882, ss. 44 and 51.

(*x*) *Bonar v. Mitchell*, (1850) 5 Ex. 415; cf. Bills of Exchange Act, 1882, ss. 89 (4) and 94.

(*y*) Cf. Bills of Exchange Act, 1882, s. 51 (2); *Windle v. Andrews*, (1819) 2 B. & Ald. 696.

(*z*) *Kendrick v. Lomax*, (1832) 2 C. & J. 405; 2 Tyr. 438; *Dando v. Boden*, [1893] 1 Q. B. 318.

(*a*) *Dando v. Boden*, *ubi supra*, per Day, J., at p. 319; cf. *Rogers v. Hunt*, (1854) 10 Ex. 474.

(*b*) *Dickinson v. Hatfield*, (1831) 5 C. & P. 46.

(*c*) *Dawson v. Morgan*, (1829) 9 B. & C. 618.

(*d*) *Dawson v. Morgan*, *ubi supra*, per Lord Tenterden, C.J., at p. 620.

(*e*) Cf. Bills of Exchange Act, 1882, s. 57; *Ex parte Roberts*, (1886) 18 Q. B. D. 286.

(*f*) Cf. *Bagnall v. Andrews*, (1830) 7 Bing. 217; *Godsell v. Lloyd*, (1911) 27 T. L. R. 383.

(*g*) *Jones v. Brooke*, (1812) 4 Taunt. 464; *Bagnall v. Andrews*, (1830) 7 Bing. 217, per Tindal, C.J., at p. 222.

(*h*) *Beech v. Jones*, (1848) 5 C. B. 696; cf. *Garrard v. Cotterell*, (1847) 10 Q. B. 679.

The holder of a bill who has commenced proceedings against several parties thereto may, after payment of the instrument by one party, continue proceedings against the others for costs (*i*). Similarly the holder of a bill who commences proceedings against the acceptor may, after payment of the instrument by another party to it, proceed with the action against the acceptor to recover costs (*k*).

But where a holder of two bills brings two actions against the same parties where one action would have sufficed, he may be allowed to recover the costs of one action only (*l*).

Consideration.

In an action upon a negotiable instrument, one of the most frequent issues raised is that of consideration.

It should be observed that the parties to an instrument are immediate or remote (*m*). *Primâ facie*, a drawer and acceptor are immediate parties, as are also an indorser and his indorsee.

A total failure of consideration (*n*), or an absence of consideration (*o*), will afford an adequate defence to an immediate party, though not to a remote party who is the holder of an instrument in due course (*p*).

Similarly, partial failure (*q*), or partial absence of consideration (*r*), is a defence *pro tanto* against an immediate party when the failure is in respect of a liquidated sum, but not otherwise (*s*). It is no defence to a remote party who is the holder of an instrument in due course (*t*).

It is to be noted that, if an instrument be given in payment for goods, evidence cannot be tendered as to inferior quality in order to prove partial failure of consideration (*u*).

The court, in deciding the question as to whether the consideration for an instrument has or has not failed, will disregard all collateral transactions, however intimately concerned they may appear to be with the making of the instrument (*x*).

Instrument vitiated by duress, fraud, etc.

In conclusion, it may be observed that negotiable instruments may, as in the case of other forms of contract, be vitiated by duress, fraud, and other similar factors.

(*i*) *London and Suburban Bank v. Walkinshaw*, (1871) 25 L. T. 704.

(*k*) *Goodwin v. Cremer*, (1852) 18 Q. B. 757; *Toms v. Powell*, (1806) 7 East, 536.

(*l*) *Jackson v. Fleeman*, (1872) 26 L. T. 584.

(*m*) *Vide* Chalmers' Bills of Exchange (7th ed.), p. 104.

(*n*) *Wells v. Hopkins*, (1839) 5 M. & W. 7.

(*o*) *Holliday v. Atkinson*, (1826) 5 B. & C. 501.

(*p*) *Robinson v. Reynolds*, (1841) 2 Q. B. 196, *per* Tindal, C.J., at p. 211.

(*q*) *Ledger v. Ewer*, (1794) Peake, 216; *cf. Morgan v. Richardson*, 1 Camp. 40, n.

(*r*) *Darnell v. Williams*, (1817) 2 Stark. 166.

(*s*) *Warwick v. Nairn*, (1855) 10 Exch. 762.

(*t*) *Archer v. Bamford*, (1822) 3 Stark. 175; *cf. Darnell v. Williams, ubi supra*, *per* Lord Ellenborough, at p. 166.

(*u*) *Morgan v. Richardson*, 1 Camp. 40, n.; *cf. Wells v. Hopkins*, (1839) 5 M. & W. 7; *Solomon v. Turner*, (1815) 1 Stark. 51.

(*x*) *Spiller v. Westlake*, (1831) 2 B. & Ad. 155; *Moggridge v. Jones*, (1811) 14 East, 486.

CHAPTER IX.

Damages in Relation to Personal Torts.

Section	I.—Personal Injuries arising through Negligence.
"	II.—Defamation.
"	III.—Breach of Promise of Marriage.
"	IV.—Seduction.
"	V.—Adultery.
"	VI.—Malicious Prosecution.
"	VII.—False Imprisonment.
"	VIII.—Assault and Battery.
"	IX.—Fraud.
"	X.—Actions against Sheriffs, Solicitors and Witnesses.

THE subject of the measure of damages in actions of tort has already been discussed in a general manner in Chapter II.

In Chapters III. and IV. certain forms of tort in relation to property were dealt with. The present chapter will be devoted to the consideration of torts of a more personal character.

At the same time, it must be recognised that no arbitrary distinction can be drawn between torts affecting property and torts which are here referred to as "personal" torts. Thus, in an action for slander, which is dealt with in this chapter as a "personal" tort, no action will lie, where the words spoken are not actionable *per se*, unless some damage of a temporal or material character be proved (*a*); while, on the other hand, in an action for trespass, the damages recoverable are not limited to the amount of property injured, but may comprise general damages, even of a vindictive character (*b*).

Breach of promise of marriage, though not, strictly speaking, a tort, is included in this chapter, because the principles governing this cause of action are more akin to those affecting torts than to those affecting contracts. (*Vide infra*, p. 206.)

SECTION I.

Personal Injuries arising through Negligence.

No action can be maintained for negligence, unless the plaintiff can discharge a certain onus of proof which in every case is laid upon him.

(*a*) *Vide infra*, p. 199.

(*b*) *Vide supra*, p. 109; cf. *Davis v. Bromley U. C.*, (1903) 67 J. P. 275.

Factors necessary for cause of action.

In the first place, he must show that the defendant has been guilty of a breach of duty towards him (*c*).

In the second place, the plaintiff must show that damage has actually been caused to him or his property as a direct result of the defendant's act (*d*).

A different rule, of course, prevails in the case of those torts in which general damage is presumed, *e.g.*, trespass and libel (*e*).

Distinction between absolute and relative duties of care.

The duty to take care to abstain from injuring others is only a relative as opposed to an absolute duty (*f*). Thus, nominal damages can always be recovered for breach of an absolute duty (*g*), but such nominal damages are entirely different from the small or contemptuous damages which may be awarded in respect of a breach of a relative duty to take care (*h*). If, therefore, no damage be proved as resulting from the defendant's breach of a relative duty, the plaintiff is not entitled to recover any damages at all (*i*).

Contractual duties.

On the other hand, contractual relations between the plaintiff and the defendant create an absolute duty, and damages can be recovered for breach of such duty, though no actual loss be proved (*k*). Therefore, a plaintiff suing for damages for negligence is in a stronger position if he can base his claim upon a contract than if he merely sues in tort (*k*).

Trespass to the person.

In one case (*l*), in which the plaintiff had sustained personal injuries through the act of the defendant, an attempt was made to recover damages for trespass to the person, after it had been already determined that the defendant was not guilty of actual negligence. But it was held that even trespass to the person was not actionable, if neither intentional nor the result of negligence.

Damage must be consequent upon defendant's act.

It will not suffice for a plaintiff merely to show that loss or damage has accrued to him after the negligent act of the defendant, unless he can also show that the loss or damage was a reasonable consequence which might have been anticipated (*m*).

(*c*) *Cox v. Burbidge*, (1863) 13 C. B. N. S. 430, *per* Erle, J., at p. 436; *Holmes v. Mather*, (1875) L. R. 10 Ex. 261; *Manzoni v. Douglas*, (1880) 6 Q. B. D. 145; *Stanley v. Powell*, [1891] 1 Q. B. 86; *cf. Cavalier v. Pope*, [1906] A. C. 428.

(*d*) *Dulieu v. White*, [1901] 2 K. B. 669, *per* Kennedy, J., at pp. 673—675. *Vote infra*.

(*e*) *Cf. Ashby v. White*, (1703) 2 Ld. Raym. 938; *Hiort v. L. & N. W. Ry. Co.*, (1879) 4 Ex. D. 188, *per* Thesiger, L.J., at p. 198.

(*f*) *Stanley v. Powell*, *ubi supra*; *cf. Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301.

(*g*) *Att.-Gen. v. Conduit Colliery Co.*, *ubi supra*.

(*h*) *The Mediana*, [1900] A. C. 113, *per* Lord Halsbury, at p. 116.

(*i*) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, *per* Lord Blackburn, at p. 142; *Dulieu v. White*, *ubi supra*, at p. 673.

(*k*) *Columbus Co. v. Clowes*, [1903] 1 K. B. 244; *cf. Marzetti v. Williams*, (1830) 1 B. & Ad. 415; *Fray v. Voules*, (1859) 1 E. & E. 839; *West v. Houghton*, (1879) 4 C. P. D. 197. *Vide supra*, pp. 2, 15.

(*l*) *Stanley v. Powell*, [1891] 1 Q. B. 86.

(*m*) *Rigby v. Hewitt*, (1850) 5 Exch. 240, at p. 243; *Greenland v. Chaplin*, *ibid.*, p. 243; *Smith v. L. & S. W. Ry. Co.*, (1870) L. R. 6 C. P. 14; *Hardaker v.*

Furthermore, if the plaintiff aggravate his personal injuries by imprudent conduct, such aggravation of injury will not be deemed to constitute a natural consequence of his original injury. But if he act reasonably, the fact that his conduct has, in fact, augmented his injuries will not, necessarily, disentitle him from recovering damages in respect of the total injury from which he is suffering (*n*).

Aggravation of injuries by plaintiff.

In appropriate cases, damages may be recovered in respect of physical disability arising through "nervous shock," whether such "shock" be caused with or without actual physical impact (*o*).

Disability arising from "shock."

Measure of Damages.

In estimating the damages recoverable for personal injuries arising through negligence three heads of loss or injury are to be considered.

Heads of damage.

(1) Personal suffering and loss of enjoyment of life (*p*).

(1) Personal suffering, etc.

Needless to say, no precise rule can be laid down as to the damages to be awarded under this head, but it is not intended that full compensation on an adequate scale should be given (*q*).

In this instance, the principle of *restitutio in integrum* must necessarily be an unattainable ideal (*q*).

Evidence might perhaps be tendered in mitigation of damages under *this particular* head to show that the plaintiff has a private income, and could therefore alleviate his personal sufferings (*r*). *Vide infra* (3).

(2) The actual pecuniary loss resulting to, and the expenses reasonably incurred by, the plaintiff (*s*).

(2) Actual loss sustained.

Loss of income up to the date of trial, in so far as it is a natural and probable result of the plaintiff's injuries, is recoverable, but evidence may be given, in diminution of damages thereunder, to show that, in the absence of such injuries, the plaintiff would nevertheless have been so situated that he could not have earned his customary income (*t*).

Idle D. Co., [1896] 1 Q. B. 335; *Cory & Son, Ltd. v. France, Fenwick & Co.*, [1911] 1 K. B. 114, at p. 122; cf. *Sharp v. Powell*, (1872) L. R. 7 C. P. 253; cf., however, *Cayzer v. Carron Co.*, (1884) 9 App. Cas. 873, per Lord Blackburn, at p. 881.

(*n*) *Jones v. Watney, Combe, Reid & Co.*, (1912) 28 T. L. R. 399.

(*o*) *Dulieu v. White*, [1901] 2 K. B. 669; *Gilligan v. Robb*, (1910) S. C. 856; *Bell v. G. N. Ry. Co.*, (1890) 26 Ir. L. R. C. L. 428; cf. *Wilkinson v. Downton*, [1897] 2 Q. B. 57; cf., however, *Victoria Railways Commissioners v. Coultas*, (1888) 13 App. Cas. 222; *The Rigel*, [1912] P. 99.

(*p*) Cf. *Blake v. Midland Ry. Co.*, (1852) 18 Q. B. 93, per Coleridge, J., at p. 111.

(*q*) *Armsworth v. S. E. Ry. Co.*, (1847) 11 Jur. 759, per Parke, B., at p. 761; *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Ex. 221, at pp. 230 and 231; cf. *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78, per James, L.J., at p. 84; *The Mediana*, [1900] A. C. 113, per Lord Halsbury, at pp. 116 and 117.

(*r*) *Phillips v. L. & S. W. Ry. Co.*, *ubi supra*, at p. 87; also 5 C. P. D. at p. 294.

(*s*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 4 Q. B. D. 406, at p. 408; *Fair v. L. & N. W. Ry. Co.*, (1869) 21 L. T. 326.

(*t*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 C. P. D. 280, per Brett, L.J., at p. 291.

If the plaintiff has not completely recovered from his injuries at the date of trial, and will be compelled to incur expense in the future, he may recover damages in respect of such future expense (*u*).

(3) Probable future loss.

(3) In cases where the plaintiff is engaged in a profession, trade, or other occupation, the probable future loss by reason of incapacity or diminished capacity to work (*v*).

The loss of future income claimed under this head need not be specially pleaded (*x*); but evidence with regard to it may, none the less, be given for the purpose of assisting the court to assess the extent of the damage incurred by the plaintiff (*x*).

In the assessment of damages arising under this head, the plaintiff's average earnings form the natural basis (*y*). At the same time, however, such contingencies as the nature of the income, and the likelihood of its continuance, and the probable duration of the plaintiff's life apart from his accident, must all be considered (*z*).

Under this head of damage, evidence as to the plaintiff being possessed of a private income is quite irrelevant (*a*).

If, prior to the accident, there existed a probability of the plaintiff actually improving his position and earning an enhanced income, this fact may be considered for the purpose of increasing the damages (*b*).

Acceleration of pre-existing disease.

If the effect of the plaintiff's injuries is to accelerate a pre-existing disease, presumably the plaintiff may recover damages in respect thereof (*c*).

Damages unaffected by insurance.

The fact that the plaintiff had insured himself against accident is wholly irrelevant to the question of damages (*d*). The same rule now applies in cases of fatal accident in which the action is brought under Lord Campbell's Act (*e*). Insurance, therefore, does not diminish the damages recoverable from the wrong-doer.

Loss subsequent to payment of agreed compensation.

If the plaintiff has accepted a certain sum as compensation for his injuries, but, subsequently, further unforeseen disabilities supervene, he will not necessarily be prevented from recovering damages by action (*f*). The question of fact, as to whether the compensation was in respect of all possible future disability, may have to be determined (*f*).

(*u*) Cf. *Phillips v. L. & S. W. Ry. Co.*, (1879) 4 Q. B. D. 406, at p. 408.

(*v*) Cf. *Lambkin v. S. E. Ry. Co.*, (1880) 5 App. Cas. 352, at p. 359.

(*x*) *Potter v. Metropolitan Ry. Co.*, (1873) 28 L. T. 735. *Vide infra*, pp. 296, 297.

(*y*) *Potter v. Metropolitan Ry. Co.*, *ubi supra*.

(*z*) *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Ex. 221; *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78; 5 C. P. D. 280; *Johnston v. G. W. Ry. Co.*, [1904] 2 K. B. 250.

(*a*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 C. P. D. 280, at p. 294.

(*b*) *Fair v. L. & N. W. Ry. Co.*, (1869) 21 L. T. 326, *per* Cockburn, C. J., at p. 327.

(*c*) Cf. *Golder v. Caledonian Ry. Co.*, (1902) 5 F. 123 (Sc.); *Warnock v. Glasgow Iron Co.*, (1904) 6 F. 474 (Sc.); cf., however, *Kerry v. England*, [1898] A. C. 742.

(*d*) *Bradburn v. G. W. Ry. Co.*, (1874) L. R. 10 Ex. 1.

(*e*) Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7), s. 1.

(*f*) *Ellen v. G. N. Ry. Co.*, [1901] 17 T. L. R. 450.

Since the measure of damages is so very much “at large” and incapable of precise assessment, a new trial will very rarely be granted on the ground of inadequacy of damages (*g*). But it may be obtained in cases where it is obviously apparent that the jury have omitted to consider some of the elements of damage (*h*). New trial.

Under the Factory and Workshop Act, 1901 (*i*), it is enacted that any penalty imposed by that Act for breach of certain provisions contained therein may be directed by the Home Secretary to be paid to the persons injured, or distributed among the relatives of persons killed, through the employer’s non-compliance with such provisions. Similar enactments have been passed with regard to mines (*k*), and these latter enactments expressly provide that such payment shall be no bar to a subsequent action for damages, nor in any way affect the measure thereof (*l*). Damages unaffected by disbursement of penalties

SECTION II.

Defamation.

Actions for defamation bring out into clear distinction the difference between general and special damages (*l*).

General damages can be awarded in any of the following cases of defamation:— Forms of defamation for which general damages may be given.

- (1) Libel.
- (2) Slander—imputing to the plaintiff the commission of a criminal offence exposing him to punishment by imprisonment (*m*).
- (3) Slander—imputing that the plaintiff is—not merely has been—suffering from venereal disease, leprosy, or the plague.
- (4) Slander—disparaging the plaintiff in his office, profession, or trade.
- (5) Slander—imputing to a girl or woman plaintiff unchastity or adultery (*n*).

Defamation under any of the above heads is said to be actionable “*per se*,” and damages in respect thereof may be recovered without proof of special damage having accrued (*o*).

But, of course, special damages in addition to general damages may be recovered in all the above cases, if they have actually Additional special damages.

(*g*) Cf. *Strafford’s Case*, cited 4 T. R. 655. *Vide infra*, pp. 200, 301.

(*h*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78; *Armystage v. Haley*, (1843) 4 Q. B. 917.

(*i*) 1 Edw. 7, c. 22, s. 136.

(*k*) 35 & 36 Vict. c. 77, s. 38; 50 & 51 Vict. c. 58, s. 70.

(*l*) *Vide supra*, pp. 2—4.

(*m*) Cf. *Hellwig v. Mitchell*, [1910] 1 K. B. 609; *Webb v. Beavan*, (1889) 11 Q. B. D. 609.

(*n*) Slander of Women Act, 1891 (54 & 55 Vict. c. 51), s. 1.

(*o*) Cf. *Tripp v. Thomas*, (1824) 3 B. & C. 427.

been sustained and pleaded. Thus, in the case of a slander upon a man in the way of his trade, a plaintiff may plead a special loss of particular customers whose names are given in the pleadings. Or he may allege and prove as special damage a general decline of trade consequent upon the slander, without naming particular customers (*p*).

Further, although in the case of slander actionable *per se*, and of libel, the law will presume an incurring of general damage, it would be apparently quite relevant and permissible, in order to support the legal presumption of general damage, to adduce—without specially pleading—evidence of any loss or injury sustained in consequence of the slander—even loss sustained after action brought (*q*). Such evidence would, of course, be evidence in aggravation of damages, but it would not, strictly speaking, be evidence of special damage (*q*). (*Vide infra*, pp. 294, 295, and *supra*, p. 2.) To this form of damage the term “general-special” damage has been applied.

Forms of
defamation
not actionable
without proof
of special
damage.

On the other hand, no action for defamation can be maintained without proof of special damage in cases where the defamation consists merely of—

- (1) Slander not actionable *per se*.
- (2) Slander of title.
- (3) Slander of goods.

Strictly speaking, (2) and (3) are not cases of defamation at all, and the principles governing actions in respect of them differ greatly from those relating to slander and libel upon personal reputation. (*Vide, infra*, p. 205.)

In the case of these latter forms of slander (1), (2) and (3), in order to constitute a cause of action, special damage must first be proved, and, in fact, may be said to form the “gist of the action” (*r*), so that the damages awarded should perhaps, in theory, be strictly confined to the special damage proved (*s*)—as strictly as, for instance, in actions of deceit.

But, in practice, in the case of (1), *i.e.*, slander not actionable *per se*, as soon as some special damage has been proved, the measure of damages is frequently treated as being “at large” (*t*).

(*p*) *Evans v. Harries*, (1856) 1 H. & N. 251; cf. *Bluck v. Lovering*, (1885) 1 T. L. R. 497; *Riding v. Smith*, (1876) 1 Ex. D. 91; *Rose v. Groves*, (1843) 5 M. & Gr. 613, *per* Cresswell, J., at p. 618.

(*q*) *Ingram v. Lawson*, (1840) 6 Bing. N. C. 212, *per* Maule, J., at p. 217; *Odgers on Libel* (4th ed.), at pp. 363, 364; *Encyclopædia of Laws of England* (2nd ed.), Vol. IV., at p. 328; cf. *Goslin v. Corry*, (1844) 7 M. & Gr. 342, *per* Cresswell, J., at p. 347; cf., however, *Bluck v. Lovering*, (1885) 1 T. L. R. 497; *Evans v. Harries*, (1856) 1 H. & N. 251.

(*r*) *Vide Ratcliffe v. Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at p. 532.

(*s*) Cf. *Dixon v. Smith*, (1860) 5 H. & N. 450.

(*t*) *Lynch v. Knight*, (1861) 9 H. L. C. 577, *per* Lord Wensleydale, at p. 598; cf. *West v. West*, (1911) *Times* Newspaper, Jan. 19th; reversed, May 24th, on the ground that no special damage whatever had been actually proved—*vide West v. West*, (1911) 27 T. L. R. 476, *per* Moulton, L.J., at p. 478. The question as to “excessive” damages was not argued.

In other words, general damages amounting even to vindictive damages are sometimes given for the injury done by the defendant (*u*)—just as, for instance, in actions for seduction, in which, also, special damage must first be proved.

The special damage necessary to maintain an action for slander based upon the publication of words not actionable *per se* must be of a temporal or material character, and must not merely consist of injury to feelings or reputation—unaccompanied by damage of a more concrete character (*v*).

Nature of requisite special damage.

Thus, it has even been held that loss of the society of one's friends, although a direct result of the uttering of a slander, does not constitute material or temporal injury sufficient to support a claim for special damage, unless accompanied by loss of hospitality (*x*).

Furthermore, in the case of slander, illness is not to be deemed a natural result of defamatory words so as to make them actionable (*y*).

Again, loss of employment, following upon the uttering of slanderous words, does not amount to special damage, unless the plaintiff's dismissal could be regarded as a reasonable consequence of the slander and one likely to follow (*z*).

The subject of special damage is further dealt with below. (*Vide* p. 204.)

It would appear that in the case of slander not actionable *per se*, a further action might perhaps be brought upon the incurring of fresh special damage (*a*). The matter is, however, very much in doubt (*b*). In the case of libel, and of slander actionable *per se*, the damages are both retrospective and prospective, and must be assessed once and for all (*c*).

Can a second action be brought?

Measure of Damages.

The measure of damages to be awarded in cases of libel and slander rests almost entirely in the discretion of the jury (*d*); apart, that is to say, from items of special damage.

(*u*) See note (*t*), p. 198, *ante*.

(*v*) *Weldon v. De Bathe*, (1884) 54 L. J. Q. B. 113, at p. 116; cf. *Roberts v. Roberts*, (1864) 5 B. & S. 384.

(*x*) *Moore v. Meagher*, (1807) 1 Taunt. 39; *Davies v. Solomon*, (1871) L. R. 7 Q. B. 112.

(*y*) *Allsopp v. Allsopp*, (1860) 5 H. & N. 534; approved in *Lynch v. Knight*, (1861) 9 H. L. C. 577. Probably the principle of these two cases would not apply to a claim for special damage in libel; cf. *Wilkinson v. Downton*, [1897] 2 Q. B. 57 per Wright, J., at p. 60; *Dulieu v. White*, [1901] 2 K. B. 669.

(*z*) *Speake v. Hughes*, [1904] 1 K. B. 138; cf. *Knight v. Gibbs*, (1834) 1 A. & E. 43; *Michael v. Spiers and Pond, Ltd.*, (1909) 25 T. L. R. 740.

(*a*) *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, at pp. 145, 146; cf. *Goslin v. Corry*, (1844) 7 M. & Gr. 342, per Tindal, C.J., at p. 345.

(*b*) Cf. Bull, N. P. 7, citing *Fitter v. Veal*, (1701) 12 Mod. 542.

(*c*) *Lord Townshend v. Hughes*, (1678) 2 Mod. 150, per North, C.J., at p. 150; *Ingram v. Lawson*, (1840) 6 Bing. N. C. 212; *Darley Main Colliery Co. v. Mitchell*, *ubi supra*, per Lord Halsbury, at pp. 132, 133.

(*d*) Cf. *Kelly v. Sherlock*, (1866) L. R. 1 Q. B. 686; *Bray v. Ford*, [1896] A. C. 44, at p. 52.

Revision of
verdict.

The verdict of the jury will not be interfered with so far as the amount is concerned, unless the damages awarded are manifestly extravagant and outrageous (*e*). (*Vide infra*, p. 301.)

A new trial will not be granted on the ground of insufficiency of damages, unless there is shown to have been actual misconduct on the part of the jury or a mistake in the calculation of figures or legal misdirection by the judge (*f*). (*Vide infra*, p. 301.)

The Court of Appeal cannot reduce the damages to such sum as it considers sufficient, instead of ordering a new trial, without the consent of both the plaintiff and defendant (*g*).

General
damages.

Substantial damages may be awarded as general damages without proof of actual loss or injury (*h*).

The damages should include fit and proper compensation for mental suffering arising from apprehension of the consequences of the publication (*i*).

Vindictive
damages.

In appropriate cases, penal or vindictive damages may be awarded (*k*).

Aggravation of Damages.

Relevancy of
defendant's
malice.

It is relevant for a plaintiff to adduce evidence as to the defendant being actuated by malice, for the purpose of enhancing the damages (*l*).

But, if such evidence establishes another cause of action, the jury should be warned against giving damages directly in respect of it (*m*).

It is difficult to lay down a precise rule, but—broadly speaking—it may be said that evidence of other libels or slanders, whether written or uttered before (*n*) or after (*o*) the commencement of the current action, may be tendered as tending to prove malice. If the different libels directly bear upon each other, they may be both regarded as part of the *res geste*. But direct damages in respect of such other libels or slanders must not be given (*p*), and if a considerable time has

(*e*) *Highmore v. Harrington (Earlof)*, (1857) 3 C. B. N. S. 142; *Praed v. Graham*, (1889) 24 Q. B. D. 53; cf., however, *Johnston v. G. W. Ry. Co.*, [1904] 2 K. B. 250, *per* Vaughan Williams, L.J., at p. 258.

(*f*) *Rendall v. Hayward*, (1839) 5 Bing. N. C. 424, *per* Tindal, C.J.; *Forsdike v. Stone*, (1868) L. R. 3 C. P. 607; *Falvey v. Stanford*, (1875) L. R. 10 Q. B. 54; cf., however, *Johnston v. G. W. Ry. Co.*, *ubi supra*.

(*g*) *Watt v. Watt*, [1905] A. C. 115.

(*h*) *Tripp v. Thomas*, (1824) 3 B. & C. 427.

(*i*) *Goslin v. Corry*, (1844) 7 M. & Gr. 342, *per* Erskine, J., at p. 346.

(*k*) Cf. *Jones v. Hulton*, [1910] A. C. 20, *per* Lord Chancellor, at p. 25.

(*l*) *Simpson v. Robinson*, (1848) 12 Q. B. 511, at p. 513; cf. *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

(*m*) *Pearson v. Le Maître*, (1843) 5 M. & G. 700, *per* Tindal, C.J., at pp. 719, 720; cf. *Darby v. Ouseley*, (1856) 1 H. & N. 1; *Anderson v. Calvert*, (1908) 24 T. L. R. 399.

(*n*) *Barrett v. Long*, (1851) 3 H. L. C. 395.

(*o*) *Macleod v. Wakley*, (1828) 3 C. & P. 311; cf. *Edgell v. Francis*, (1840) 1 M. & Gr. 222; *Finnerty v. Tipper*, (1809) 2 Camp. 74.

(*p*) *Pearson v. Le Maître*, *ubi supra*; *Anderson v. Calvert*, *ubi supra*; cf. *Darby v. Ouseley*, (1856) 1 H. & N. 1.

elapsed between the publication of the separate libels, the jury should be warned as to whether subsequent statements do or do not refer to something which may have occurred in the intervening period (*q*).

Furthermore, the whole conduct of the defendant down to the date of the verdict may be considered (*r*).

Thus, a plea of justification, though subsequently abandoned, may serve to aggravate the damages (*s*), as may, also, refusal to apologise, or industrious circulation of the libel (*t*), or recklessness as to the consequences of the libel (*u*).

The plaintiff cannot give evidence of general good character, unless the defendant, in the pleadings, or by his witnesses, makes reflections upon it (*x*). It is presumed to be good. But, such evidence can be given, in some cases, if it goes to prove that the defendant knew the libel to be false at the time he wrote it (*y*). Evidence as to character.

If there are two or more defendants, the malice of one must not be allowed to aggravate, unduly, the damages against the other or others (*z*). Joint tort-feasors.

If the plaintiff desire to obtain the fullest vindictive damages he should sue, separately, the chief offender (*a*).

Incidentally, it may be observed that a principal is not responsible for the malice of his agent so as to be liable to vindictive damages, though he may be responsible for the wrongful acts committed by his agent, who was, in fact, actuated by malice (*b*). Principal and agent.

Mitigation of Damages.

A defendant cannot, even by cross-examination, prove facts, relating to unpleaded matter, merely for the purpose of diminishing damages, if such facts, duly pleaded, would have afforded a complete defence to the action (*c*). But, subject to the last-

- (*q*) *Hemmings v. Gasson*, (1858) E. B. & E. 346.
- (*r*) *Praed v. Graham*, (1890) 24 Q. B. D. 53; *Anderson v. Calvert*, (1908) 24 T. L. R. 399.
- (*s*) *Warwick v. Foulkes*, (1844) 12 M. & W. 507; *Simpson v. Robinson*, (1848) 12 Q. B. 511, at p. 513.
- (*t*) *Gathercole v. Miall*, (1846) 15 M. & W. 319; *Vines v. Serell*, (1835) 7 C. & P. 163.
- (*u*) *Jones v. Hulton*, [1910] A. C. 20.
- (*x*) *Guy v. Gregory*, (1840) 9 C. & P. 584, 587; *Brine v. Bazalgette*, (1849) 3 Exch. 692.
- (*y*) *Fountain v. Boodle*, (1842) 3 Q. B. 5; cf. *Brine v. Bazalgette*, *ubi supra*.
- (*z*) *Clark v. Newsam*, (1847) 1 Exch. 131, at pp. 139 and 140; cf. *Gregory v. Cotterell*, (1852) 22 L. J. Q. B. 217. *Vide infra*, p. 300.
- (*a*) *Clark v. Newsam*, *ubi supra*, per Pollock, C.B., at p. 140.
- (*b*) *Carmichael v. Waterford and Limerick Ry. Co.*, (1849) 13 Ir. L. R. 313; *Black v. North British Ry. Co.*, (1908) S. C. 444, per the Lord President; cf. *Citizen Life Assurance Co. v. Brown*, [1904] A. C. 423; *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; cf. also, *Robertson v. Wylde*, (1838) 2 Moo. & Rob. 101.
- (*c*) Cf. *Watt v. Watt*, [1905] A. C. 115, at p. 118.

mentioned proviso, a defendant may adduce, in mitigation of damages, any material relevant considerations.

Evidence as
to character.

Thus, even where the defendant does not plead that the alleged libel is true, he may, under Ord. XXXIV., r. 37, R. S. C., by giving seven days' notice to the plaintiff, tender evidence of the plaintiff's bad character, or the circumstances under which the libel or slander was published. But evidence as to character must deal with the plaintiff's general reputation. Particular instances of misconduct cannot be gone into (*d*).

Evidence to
rebut malice.

Furthermore, the defendant may attempt, without giving any notice, to show that in publishing the libel or slander he was acting under a sense of duty or from honest motives, or was labouring under a misapprehension—in short, that he was not actuated by malice nor reckless (*e*).

Thus, if it appears, on the face of the libel, that it is founded on a statement in a certain newspaper, the defendant may show that he derived it from that source and believed it to be true (*f*).

Further, if, at the time of publication of the libel or slander, the defendant named his informant, he may, in mitigation, prove the fact of his having received the information from such informant (*g*). But, where the libel does not purport to be derived from any outside source, no evidence can be given of its having been actually so derived (*h*). Still less can a defendant—except by statute, *vide infra*—prove simultaneous or prior publication of libels upon the plaintiff by others (*i*). Such evidence would be *res inter alios acta*, and would be immaterial to the question of malice.

Evidence in mitigation of damages may also be given to show that the plaintiff had previously libelled the defendant, provided such libel directly provoked the defendant to retaliate (*k*).

Libel Amend-
ment Act,
1888.

By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6, in an action for a libel contained in any newspaper, the defendant can give evidence in mitigation of damages showing that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation in respect of a libel or libels of a similar character.

Apology.

By Lord Campbell's Act, 1843 (6 & 7 Vict. c. 96), s. 1, it is

(*d*) *Scott v. Sampson*, (1882) 8 Q. B. D. 491.

(*e*) *Pearson v. Le Maître*, (1843) 5 M. & Gr. 700; cf. *Hunt v. Algar*, (1833) 6 C. & P. 245; *Smith v. Scott*, (1847) 2 C. & K. 580.

(*f*) *Mullett v. Hulton*, (1803) 4 Esp. 248.

(*g*) *Bennett v. Bennett*, (1834) 6 C. & P. 588; *Davis v. Cutbush*, (1859) 1 F. & F. 487.

(*h*) *Talbutt v. Clark*, (1840) 2 Moo. & Rob. 312; cf., however, *Creevy v. Carr*, (1835) 7 C. & P. 64; *De Bensuade v. Conservative Newspaper*, (1887) 3 T. L. R. 538.

(*i*) *Saunders v. Mills*, (1829) 6 Bing. 213; *Tucker v. Lawson*, (1886) 2 T. L. R. 593.

(*k*) *Finnerty v. Tipper*, (1809) 2 Camp. 72; cf. *Fraser v. Berkeley*, (1836) 7 C. & P. 621.

enacted that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention, given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

By section 2 of the same Act it is provided that, in an action for libel in any newspaper or periodical, the defendant may plead an early apology, and that the libel was inserted without actual malice and without gross negligence. But money must be paid into court at the same time that this plea is put forward (8 & 9 Vict. c. 75, s. 2).

Apology and payment into court.

Hence, no defence denying liability can be joined with such plea (Ord. XXII., r. 1, R. S. C.). The fact of such payment into court must not be mentioned to the jury (Ord. XXII., r. 22, R. S. C.).

But the safest course to pursue in the case of a newspaper libel would appear to be to apologise and to pay money into court under the Judicature Act, in accordance with Ord. XXII., r. 1, R. S. C., instead of under the above section, because, unless the jury find that the libel was inserted "without actual malice and without gross negligence," the payment into court would be of no avail (*l*).

A further objection to paying money into court under Lord Campbell's Act, 1843, is that the plaintiff may conceivably in such cases recover the whole amount paid in, although the jury award a less sum (*m*). Again, although Ord. XXII., r. 22, certainly prevents the amount of damages paid into court under Lord Campbell's Act, 1843, from being mentioned, it is doubtful whether the fact of a payment being made under that Act can be wholly withheld from the court (*n*).

On the other hand, where the defendant pays money into court under Ord. XXII., r. 1, without a denial of liability, the plaintiff may take it out and either continue the action or accept such sum in complete satisfaction (*o*).

But, where money is paid into court under Lord Campbell's Act, 1843, the plaintiff cannot both take the money out and proceed with his action (*p*).

(*l*) *Oxley v. Wilkes*, [1898] 2 Q. B. 56; cf. *Sley v. Tillotson*, (1898) 62 J. P. 505.

(*m*) *Gray v. Bartholomew*, [1895] 1 Q. B. 209, *per Lopes, L.J.*, at p. 211.

(*n*) *Vide* Annual Practice, 1911, at p. 355, under notes to R. S. C., Ord. XXII., r. 22.

(*o*) *Vide* Ord. XXII., rr. 5 and 7; *Brown v. Feeney*, [1906] 1 K. B. 563, at p. 566.

(*p*) *Harris v. Arnott*, (1889) 24 L. R. Ir. 404.

A defendant may, however, in any action for defamation, give evidence of any apology—for what it may be worth—even though the apology was not made at an early stage (*q*).

Special
damage.

The subject of special damage has already been touched upon in connection with slander not actionable *per se* (*r*). It was there pointed out that special damage, if alleged, must be of a material and temporal character (*s*), and must be the direct result of the defendant's act of defamation and must be a reasonable consequence thereof—such as might have been anticipated (*t*), without the intervention of capricious or irrational factors (*t*).

Damage
arising from
act of third
party.

Hence, the act of a third party, if it be a rational consequence of the defamation by the defendant, will not be deemed too remote (*u*). Nor will the defendant be able to get rid of his responsibility for the act of a third party merely by reason of the fact that the plaintiff has a cause of action against such third party (*x*).

Repetition by
third party.

But a defendant will not be responsible for the spontaneous repetition by a third party of a libel or slander originally uttered by such defendant (*y*).

A defendant will, however, be responsible for a third party's repetition in two cases: (1) If the defendant intended and desired or asked such third party to repeat the libel or slander. In this case the third party becomes, as it were, the defendant's agent (*z*). (2) If the defendant, by publishing a libel or slander to a third party, put such third party under a moral or legal obligation to repeat it to a person or persons immediately concerned. The circumstances of such a publication are deemed to make the repetition a natural and probable consequence (*a*).

Damage must
have accrued
to plaintiff
himself.

Special damage to be recoverable must have accrued from loss inflicted upon the plaintiff himself (*b*). Hence, no one can sue for defamation of a third party except in the following cases:—

(*q*) *Smith v. Harrison*, (1856) 1 F. & F. 565.

(*r*) *Vide supra*, p. 199.

(*s*) *Roberts v. Roberts*, (1864) 5 B. & S. 384.

(*t*) *Kelly v. Partington*, (1833) 5 B. & Ad. 645; *Lynch v. Knight*, (1861) 9 H. L. C. 577, per Lord Wensleydale, at p. 600; cf. *Chamberlain v. Boyd*, (1883) 11 Q. B. D. 407; *Haddan v. Lott*, (1854) 15 C. B. 411.

(*u*) *Société Française des Asphaltes v. Farrell*, (1885) Cab. & El. 563. Contrast *Knight v. Gibbs*, (1834) 1 A. & E. 43, with *Ashley v. Harrison*, (1793) 1 Esp. 48. See also *Michael v. Spiers and Pond, Ltd.*, (1909) 25 T. L. R. 740.

(*x*) *Lumley v. Gye*, (1853) 2 E. & B. 216; *Bowen v. Hall*, (1881) 6 Q. B. D. 333. *Vide supra*, p. 19.

(*y*) *Ward v. Weeks*, (1830) 7 Bing. 211; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, per Bowen, L.J., at p. 530; cf. *Bree v. Marescaux*, (1881) 7 Q. B. D. 434.

(*z*) Cf. *Whitney v. Moignard*, (1890) 24 Q. B. D. 630, at p. 631; *Ratcliffe v. Evans*, *ubi supra*, at p. 530.

(*a*) *Ratcliffe v. Evans*, *ubi supra*, at p. 530; cf. *Speight v. Gosnay*, (1891) 60 L. J. Q. B. 231, per Lopes, L.J.; *Ecklin v. Little*, (1890) 6 T. L. R. 366.

(*b*) *Robinson v. Marchant*, (1845) 7 Q. B. 918.

(1) A husband may sue for special damage caused to him by defamation of his wife (*c*).

(2) A master who has lost the services of his servant or a person whose interest in a contract of service of any kind with a third party had been injured, by reason of the defamation of such servant or third party, might conceivably bring an action upon the case against the traducer (*d*).

In spite of the Married Women's Property Act, 1882, it is doubtful whether a wife could sue for loss resulting to her from a libel or slander upon her husband (*e*). Such action, if it lay at all, would have to be an action on the case. It has been held that a wife cannot sue for special damage inflicted upon her husband by a slander upon her (*f*), and this clearly is still the law (*g*).

It is enacted by section 5 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), that the court may, upon application by two or more defendants in actions arising from substantially the same libel brought by one and the same person, order such actions to be consolidated and tried together. In such a consolidated action the jury shall assess the whole amount of the damages in one sum, but a separate verdict shall be taken for or against each defendant as if the actions had been tried separately, and the jury shall apportion the damages, and the judge may apportion the costs among the different defendants.

Consolidation of actions.

An application under this section may be made before the defences have been delivered (*h*), or although the defences are fundamentally different in character (*i*).

It is important to note that in an action brought under the Slander of Women Act, 1891, the plaintiff cannot recover more costs than damages, unless the judge shall expressly certify that there was reasonable ground for bringing the action.

Costs under Slander of Women Act, 1891.

No damages are recoverable in an action for slander of title or slander of goods unless there be proved :

Slander of title.

(1) An incurring of special damage.

(2) Malice on the part of the defendant.

(3) Untruth of the statements alleged against the defendant (*k*).

In accordance with the general rule, the special damage alleged must be specially pleaded with sufficient precision (*l*).

(*c*) *Coward v. Wellington*, (1836) 7 C. & P. 531 ; cf. *Dengate v. Gardiner*, (1838) 4 M. & W. 5 ; *Riding v. Smith*, (1876) 1 Ex. D. 91 ; *Guy v. Gregory*, (1840) 9 C. & P. 584.

(*d*) Cf. *Lumley v. Gye*, (1853) 2 E. & B. 216 ; *Ashley v. Harrison*, (1793) 1 Esp. 48 ; *Riding v. Smith*, *ubi supra*, at p. 93.

(*e*) Cf. *Weldon v. Winslow*, (1884) 13 Q. B. D. 784, *per* Bowen, L.J., at p. 788 ; *Lynch v. Knight*, (1861) 9 H. L. C. 577, *per* Lord Wensleydale, at p. 597.

(*f*) *Harwood v. Hardwick*, (1668) 2 Kebb. 387 ; *Dengate v. Gardiner*, *ubi supra*.

(*g*) *Weldon v. Winslow*, *ubi supra*, at p. 788.

(*h*) *Stone v. Press Association*, [1897] 2 Q. B. 159.

(*i*) *Eddison v. Dalziel*, (1893) 9 T. L. R. 334.

(*k*) *White v. Mellins*, [1895] A. C. 154 ; *Lynne v. Nichols*, (1906) 23 T. L. R. 86.

(*l*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at pp. 532 and 533.

SECTION III.

Breach of Promise of Marriage.

Strictly speaking, an action for breach of promise of marriage is not, of course, an action in respect of a tort, but in respect of a contract. The principles governing the measure of damages therefor, are, however, much more akin to those relating to torts than to those relating to contracts, and for that reason this section has been included in the present chapter.

Measure of Damages.

Vindictive
damages.

In the first place, it is to be noted that punitive or vindictive damages may be awarded in this species of action (*m*).

Factors
governing
damages
recoverable.

The damages are as much "at large" as they are in an action for defamation. Nevertheless, although no precise standard for the purpose of assessment of damages can be laid down, it is intended that the court should pay due regard to those factors which may legitimately be urged either in aggravation or mitigation (*n*).

Evidence may be called, in aggravation of damages, as to the defendant's wealth and social status in order to show the magnitude of the loss entailed upon the plaintiff by the defendant's refusal to marry (*o*). But such loss cannot be specifically claimed as special damage resulting to the plaintiff (*p*).

Special
damage.

If, however, it could be proved that the plaintiff had incurred special expenses, *e.g.*, for a trousseau, or had withdrawn from a contract of service in consequence of the promise of marriage, and that such expense or loss had been contemplated by the defendant at the time of the promise, a claim for special damage in respect thereof might perhaps be maintained (*q*).

It would only be in respect of special damage to the deceased's property that any action could be brought by the executors of a deceased party to a contract to marry, for breach of such contract (*r*).

Seduction.

In aggravation of damages, evidence may also be given showing that the defendant seduced the plaintiff (*s*). Such fact may be, and perhaps should be, specially pleaded (*s*).

(*m*) *Wood v. Hurd*, (1835) 2 Bing. N. C. 166; *Finlay v. Chirney*, (1888) 20 Q. B. D. 494, *per* Bowen, L.J., at p. 504.

(*n*) *Smith v. Woodfine*, (1857) 1 C. B. N. S. 660, *per* Willes, J., at p. 669.

(*o*) *Wood v. Hurd*, *ubi supra*; *James v. Biddington*, (1834) 6 C. & P. 589; *cf.* *Kerfoot v. Marsden*, (1860) 2 F. & F. 160.

(*p*) *Finlay v. Chirney*, (1888) 20 Q. B. D. 494, *per* Lord Esher, M.R., at p. 501.

(*q*) *Finlay v. Chirney*, *ubi supra*, at p. 501, and *per* Bowen, L.J., at p. 508.

(*r*) *Finlay v. Chirney*, *ubi supra*. Similarly as against the executors of a deceased party to the contract: *Chamberlain v. Williamson*, (1814) 2 M. & S. 408.

(*s*) *Millington v. Loring*, (1880) 6 Q. B. D. 190.

The jury should be directed not to give damages directly in respect of the seduction, but they may take it into account in estimating the injury done to the plaintiff's social position (*t*).

Evidence may be tendered in mitigation of damages to show that the plaintiff—if a female—had been guilty of indecent or licentious conduct after the date of the promise or prior to such date; but if prior, it must have been unknown to the defendant (*u*).

Evidence as to conduct and character.

Evidence of the general bad character of, or evil report concerning, the plaintiff may also be given (*x*).

Any substantial factor, *e.g.*, gross incompatibility of temperament, tending to show that the marriage must necessarily have been disastrous, may be urged upon the court to show that the plaintiff's loss was of small proportions (*y*).

In addition to the evidence outlined in the last paragraph which may be given in mitigation of damages, there are certain kinds of evidence which may be tendered to show that the defendant was thoroughly justified in breaking his promise.

Evidence in bar of action.

In such cases, if the evidence is substantiated, the plaintiff is entitled to no damages at all. Such evidence must be specially pleaded. (*Vide* Taylor on Evidence (10th ed.), at p. 279.)

Thus, evidence may be called to show that the defendant was induced to make the promise by wilful misrepresentation or suppression of important facts concerning the plaintiff's circumstances or past life (*z*), or physical condition (*a*).

It also may suffice to show that the defendant was unaware at the date of the promise that the plaintiff had previously acted in an immoral and dissolute manner (*b*).

In one case, evidence merely as to a female plaintiff's general reputation was deemed to be sufficient (*c*).

It would appear that a defendant may also be justified in breaking his or her promise by the subsequent brutal (*d*), immoral (*e*), or criminal (*f*) conduct of the plaintiff.

(*t*) *Berry v. Da Costa*, (1866) L. R. 1 C. P. 331; cf. *Finlay v. Chirney*, (1888) 20 Q. B. D. 494, *per* Lord Esher, at p. 501.

(*u*) *Smith v. Woodfine*, (1857) 1 C. B. N. S. 660, *per* Willes, J., at p. 670; cf., however, *Bench v. Merrick*, (1844) 1 C. & K. 463, at pp. 467 and 468.

(*x*) Cf. *Baddeley v. Mortlock*, (1816) Holt, N. P. 151; *Foulkes v. Sellway*, (1801) 3 Esp. 236.

(*y*) *Leeds v. Cook*, (1803) 4 Esp. 256, *per* Lord Ellenborough, at p. 258.

(*z*) *Wharton v. Lewis*, (1824) 1 C. & P. 529; *Foot v. Hayne*, (1824) 1 C. & P. 546; *Baddeley v. Mortlock*, *ubi supra*; cf. *Beechey v. Brown*, (1860) E. B. & E. 796.

(*a*) *Atchinson v. Baker*, (1796) Peake, 103, at p. 105; cf., however, *Baker v. Cartwright*, (1861) 10 C. B. N. S. 124.

(*b*) *Irving v. Greenwood*, (1824) 1 C. & P. 350; *Smith v. Woodfine*, (1857) 1 C. B. N. S. 660, at p. 670.

(*c*) *Foulkes v. Sellway*, (1801) 3 Esp. 236.

(*d*) *Leeds v. Cook*, (1803) 4 Esp. 256, *per* Lord Ellenborough, at p. 258.

(*e*) If the plaintiff be a woman; cf. *Smith v. Woodfine*, *ubi supra*, at p. 670; *Jones v. James*, (1868) 18 L. T. 243; *Hall v. Wright*, (1859) E. B. & E. 746, *per* Williams, J., at p. 792.

(*f*) Cf. *Baddeley v. Mortlock*, (1816) Holt, N. P. 151.

But a breach is not justified on account of the defendant's own subsequent bodily infirmity, as opposed to corporal inaptitude for marriage (*g*).

SECTION IV.

Seduction.

Basis of cause
of action.

In an action for seduction, the proper person who should sue is the master of the seduced girl. The cause of action is the loss of the benefit of the girl's services, induced by the defendant's wrongful act. It is not necessary to prove an express contract of service. If the plaintiff is the father, and the girl is under age and living at home subject to her father's control and command, service may be presumed (*h*). But it will not suffice for a father merely to prove that his daughter originally maintained herself by her own exertions, and became dependent upon him in consequence of the seduction (*i*).

If the plaintiff is not the father, or if the girl is not under age, service may be presumed from slight acts of household work, *e.g.*, milking of cows or making tea, provided the girl is living under the plaintiff's roof as one of his family (*k*).

The action, it has been said, is founded upon a fiction, but for that fiction there must be some foundation in fact, however slender (*l*).

The relationship of master and servant must have existed both at the time of seduction and at the time of illness and loss of service, for the action to be maintainable (*m*).

Measure of Damages.

Although it is thus necessary in the first place to prove some special damage, the measure of damages recoverable in an action for seduction is quite "at large"—in cases where the plaintiff is the father of or *in loco parentis* to (*n*) the seduced girl.

The damages are to be awarded not merely, or even chiefly, in respect of the actual loss of service, but in respect of injury to the feelings and reputation of the parent (*o*).

(*g*) *Hall v. Wright*, *ubi supra*, per Willes, J., at p. 785; cf. also per Williams, J., at p. 792; cf., however, *Atchinson v. Baker*, (1796) Peake, 103, at p. 105.

(*h*) *Maunder v. Venn*, (1829) Moo. & M. 323, per Littledale, J.; *Thompson v. Ross*, (1859) 5 H. & N. 16, per Bramwell, B.

(*i*) *Rist v. Faur*, (1863) 4 B. & S. 409.

(*k*) *Bennett v. Alcott*, (1787) 2 T. R. 168, per Butler, J.; cf. *Evans v. Walton*, (1867) L. R. 2 C. P. 615.

(*l*) Cf. *Whitbourne v. Williams*, [1901] 2 K. B. 722, per Vaughan Williams, L.J., at p. 725.

(*m*) *Davis v. Williams*, (1848) 10 Q. B. 725; *Hamilton v. Long*, [1905] 2 I. R. 552.

(*n*) Cf. *Irwin v. Dearman*, (1809) 11 East, 23; cf. *Manvell v. Thompson*, (1826) 2 C. & P. 303.

(*o*) *Irwin v. Dearman*, (1809) 11 East, 23, per Lord Ellenborough, at p. 24 *Terry v. Hutchinson*, (1868) L. R. 3 Q. B. 599, per Blackburn, J., at p. 602.

Vindictive damages may therefore be given (*p*).

Vindictive damages.

In aggravation of damages evidence may be given as to the position of the parties (*q*), though not as to the actual specific wealth of the defendant (*r*).

Evidence may also be given to show that the defendant's conduct in procuring the seduction was markedly reprehensible (*s*), but no direct evidence can be given as to a breach of promise of marriage (*t*).

In certain cases, however, evidence as to a promise of marriage has been admitted for the indirect purpose of establishing the comparatively good character of the seduced girl (*u*).

If the plaintiff is not the parent of, nor *in loco parentis* to, the seduced girl, but merely her master, the measure of damages is confined to the actual loss sustained through loss of service (*v*). Master can only recover actual loss.

It follows, from what has just been stated, that a master, who has recovered from his servant a penalty agreed upon in case of breach of service, cannot recover damages from the seducer of such servant (*x*).

The damages are similarly confined to the actual loss sustained through loss of service, in cases where the "seduction" of the girl from the service of her parent is unaccompanied by debauching (*y*), unless the defendant's act was prompted by express malice (*z*).

Such form of action is to all intents and purposes similar to an ordinary action for enticing away of servants or inducing them to break their contract (*a*).

In estimating the consequent loss the court need not, in flagrant cases, confine its consideration merely to such period as the servant was strictly bound to serve her master (*b*).

Evidence may be tendered in mitigation of damages to prove that the seduced girl was immodest in character (*c*), or that the plaintiff was unduly careless in his guardianship over her (*d*). Evidence as to character.

But the tendering of evidence reflecting upon the girl's

(*p*) *Tullidge v. Wade*, (1769) 3 Wils. 18, *per* Wilmot, C.J., at p. 19.

(*q*) *Andrews v. Askey*, (1837) 8 C. & P. 7.

(*r*) *Hodsoll v. Taylor*, (1873) L. R. 9 Q. B. 79, at pp. 81, 82.

(*s*) *Dodd v. Norris*, (1814) 3 Camp. 519; *cf.* *Elliott v. Nicklin*, (1818) 5 Price, 641.

(*t*) *Tullidge v. Wade*, (1769) 3 Wils. 18; *Dodd v. Norris*, *ubi supra*; *cf.* *Elliott v. Nicklin*, *ubi supra*.

(*u*) *Cf.* *Elliott v. Nicklin*, *ubi supra*.

(*v*) *McKenzie v. Hardinge*, (1906) 23 T. L. R. 15.

(*x*) *Bird v. Randal*, (1762) 3 Burr. 1345.

(*y*) *Cf.* *Evans v. Walton*, (1867) L. R. 2 C. P. 615.

(*z*) *Cf.* *Lumley v. Gye*, (1853) 2 E. & B. 216, *per* Crompton, J., at p. 230.

(*a*) *Evans v. Walton*, *ubi supra*, *per* Willes, J.; *cf.* *Gunter v. Astor*, (1819) 4 Moore, 12.

(*b*) *Gunter v. Astor*, *ubi supra*; *cf.* *Lumley v. Gye*, *ubi supra*, at p. 230.

(*c*) *Verry v. Watkins*, (1836) 7 C. & P. 308; *cf.* *Carpenter v. Wall*, (1840) 3 P. & D. 457.

(*d*) *Reddie v. Scoolt*, (1794) 1 Peake, 316.

character would entitle the plaintiff to do what he could not otherwise have done, namely, call evidence as to the girl's general good character (*e*). Similarly, cross-examination of the seduced girl, with a view to showing that she was a wanton, may entitle the plaintiff to call evidence of good character (*f*).

SECTION V.

Adultery.

Matrimonial
Causes Act,
1857.

Section 59 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), has abolished the old common law action for criminal conversation. But it is enacted by section 33 of that Act that a husband may, either in a petition for dissolution of marriage, or for judicial separation, or by petition merely in respect of damages for adultery, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation were formerly tried and decided in courts of common law (*g*); and the damages to be recovered are in all cases to be ascertained by the verdict of a jury, although the respondents, or either of them, may not appear.

Measure of Damages.

In assessing the damages against a co-respondent, the same factors are to be considered by the jury as were formerly relevant in actions for criminal conversation (*g*).

The measure of damages is the loss sustained by the husband through the deprivation of his wife and by the indignity inflicted upon him (*h*), irrespective of and altogether apart from the wealth of the co-respondent (*i*).

The amount of damages claimed should be specified (*k*).

Evidence is admissible with regard to the particular circum-

(*e*) Cf., however, *Bamfield v. Massey*, (1808) 1 Camp. 460; *King v. Francis*, (1800) 3 Esp. 116.

(*f*) *Bate v. Hill*, (1823) 1 C. & P. 100; *Brown v. Goodwin*, (1841) Ir. Circ. Cas. 61; cf. *Dodd v. Norris*, (1814) 3 Camp. 519. *Vide* Taylor on Evidence (10th ed.), Vol. I., at p. 281.

(*g*) Matrimonial Causes Act, 1857, s. 33; cf. *Seddon v. Seddon*, (1860) 30 L. J. P. & M. 12; *Comyn v. Comyn*, (1860) 32 L. J. P. & M. 210; *Lord v. Lord*, [1900] P. 297.

(*h*) *Cowing v. Cowing*, (1863) 33 L. J. P. & M. 149; *Wilton v. Webster*, (1835) 7 C. & P. 198, *per* Coleridge, J., at p. 202.

(*i*) *Keyse v. Keyse*, (1886) 11 P. D. 100.

(*k*) *Spedding v. Spedding*, (1862) 31 L. J. P. & M. 96.

stances of each case, for the purpose of enhancing or diminishing the damages recoverable (*l*).

Thus, the extent to which the petitioner valued the society of his wife, the rank and position of the petitioner, and the general character of the wife at the time of the adultery, may all be properly brought under consideration (*m*).

The determination of such factors is eminently within the jury's province, and their assessment of damages will not be interfered with unless it is manifestly improper (*n*). But, although the damages are to a considerable degree at large, adultery is not usually regarded as being a cause of action for which vindictive damages may be given, as they may, for instance, in seduction. The damages should be compensatory rather than vindictive (*o*).

Perhaps the most serviceable method of treating this subject is to deal specifically, in a summary form, with each one of the more usual points urged in aggravation or mitigation of damages.

In the first place, it may be observed that adultery of the husband will probably defeat any claim of his for damages, since the court will not exercise the discretionary power given to it by section 31 of the Matrimonial Causes Act, 1857, to enable him to recover damages (*p*). Adultery of petitioner.

A voluntary separation between the husband and wife does not disentitle the husband from claiming damages (*q*). But such separation may in certain cases be urged in diminution of damages (*r*). Voluntary separation.

In diminution of damages, evidence may be called to show that the petitioner was a careless husband and did not adequately protect his wife, or that the defendant was unaware that the respondent was a married woman (*s*). Carelessness of petitioner.

Furthermore, it has been held that the jury need not award any damages if they consider that the conduct of the parties has been such as to disentitle the petitioner to damages (*t*); though

(*l*) *Pollard v. Pollard*, (1864) 3 Sw. & Tr. 613; cf. Buller, N. P. (7th ed.), at p. 27.

(*m*) *Trelawney v. Coleman*, (1817) 1 B. & Ald. 90; *Willis v. Bernard*, (1832) 8 Bing. 376; *Winter v. Wroot*, (1834) 1 Moo. & R. 404; *Winter v. Henn*, (1831) 4 C. & P. 494, *per* Alderson, B., at p. 498; Buller, N. P., *ubi supra*.

(*n*) *Wilford v. Berkeley*, (1758) 1 Burr. 609; cf. *Long v. Long*, (1890) 15 P. D. 218.

(*o*) *Wilton v. Webster*, (1835) 7 C. & P. 198, *per* Coleridge, J., at p. 202.

(*p*) *Cox v. Cox*, [1906] P. 267; overruling *Bromley v. Wallace*, (1802) 4 Esp. 237; cf. *Bernstein v. Bernstein*, [1893] P. 292.

(*q*) *Evans v. Evans*, [1899] P. 195; *Izard v. Izard*, (1889) 14 P. D. 45; cf. *Edwards v. Crock*, (1801) 4 Esp. 39; *Weedon v. Timbrell*, (1793) 5 T. R. 357.

(*r*) *Calcraft v. Harborough (Earl of)*, (1831) 4 C. & P. 499; *Lord v. Lord*, [1900] P. 297.

(*s*) *Calcraft v. Harborough (Earl of)*, *ubi supra*, *per* Tindal, C.J., at p. 501; cf. *Lord v. Lord*, *ubi supra*; *Keyse v. Keyse*, (1886) 11 P. D. 100; *Duberley v. Gunning*, (1792) 4 T. R. 651, *per* Buller, J., at p. 657.

(*t*) *Gibson v. Gibson*, (1906) 94 L. T. 619; *Smith v. Alison*, Buller, N. P. (7th ed.), at p. 27; cf. *Pegler v. Pegler*, (1901) 85 L. T. 649.

there is some authority to the effect that some damages must be given if adultery be proved (*u*).

Connivance
of petitioner.

If the petitioner has been accessory to, or connived at; or has condoned his wife's adultery, he cannot recover any damages at all (*x*). In this respect the old common law principle has been altered by the Matrimonial Causes Act, 1857 (*x*).

Judicial
separation.

If there exist a judicial separation between husband and wife, subsequent adultery may be made a ground for obtaining a divorce (*y*). Since, however, in such a case the husband would have no right to claim the consortium of his wife, he would presumably be unable to recover damages for adultery.

Character of
respondent.

In mitigation of damages it may be proved that the petitioner's wife had lived an immoral life prior to the adultery alleged against the defendant (*z*), but no evidence as to her subsequent misconduct can be given (*a*), since the defendant may have been responsible for it. A petitioner may recover damages from more than one defendant (*b*).

Defendant's
pecuniary
position.

The defendant's means are, in general, inadmissible in evidence (*c*) in an action for adultery, though they may be urged in aggravation of damages if the defendant has used them to further his purpose (*d*).

Conversely, evidence of the defendant's poverty has been admitted for the purpose of showing that the temptation to adultery did not emanate from the defendant.

The pecuniary position of the husband in respect of money settled upon the wife may, apparently, be submitted to the jury for their consideration (*e*).

Application
of damages.

After the verdict or decree, the court may direct in what manner the damages shall be paid or applied, and can direct that the whole, or any part thereof, shall be settled for the benefit of the children—if any—or for the maintenance of the wife (*f*).

The court can therefore exercise its discretion (*g*), and can

(*u*) *Spedding v. Spedding*, (1862) 31 L. J. P. & M. 96, n.

(*v*) *Bernstein v. Bernstein*, [1893] P. 292; cf. *Hyman v. Hyman*, [1904] P. 403.

(*y*) Cf. *Bland v. Bland*, (1866) L. R. 1 P. & M. 237.

(*z*) *Watson v. Watson*, (1905) 21 T. L. R. 320; *Winter v. Henn*, (1831) 4 C. & P. 494, at p. 498.

(*a*) *Elsam v. Faucett*, (1797) 2 Esp. 562; *Winter v. Henn*, *ubi supra*, at p. 498.

(*b*) Cf. *Gregson v. Theaker*, (1808) 1 Camp. 415, n.

(*c*) *James v. Bidlington*, (1834) 6 C. & P. 589, *per* Alderson, B., at p. 590; *Keyse v. Keyse*, (1886) 11 P. D. 100; cf. *Bikker v. Bikker*, (1892) 67 L. T. 721.

(*d*) *Cowing v. Cowing*, (1863) 33 L. J. P. & M. 149, at p. 150, and note thereto quoting *Forster v. Forster*.

(*e*) Cf. *Bell v. Bell*, (1859) 1 Sw. & Tr. 565; *Winsmore v. Greenbank*, (1745) Willes, 577, 580.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33; cf. *Patterson v. Patterson*, (1870) L. R. 2 P. & D. 189.

(*g*) Cf. *Keats v. Keats*, (1859) 28 L. J. P. & M. 57; *Pounsford v. Pounsford*, (1860) 30 L. J. P. & M. 188; *Meyern v. Meyern*, (1876) 2 P. D. 254; *Taylor v. Taylor*, (1870) 39 L. J. P. & M. 23.

consider the conduct of the parties (*h*), in determining the application of the damages awarded.

Agreements meeting with the approval of the court may be made as to the application of the damages (*i*). But unfair agreements can be set aside by the court (*k*).

The court may order a co-respondent, who is proved to have committed adultery, to pay the whole or any part of the costs of the proceedings upon the petition (*l*). Costs.

The co-respondent is generally liable to pay the costs where the husband succeeds in his petition (*m*); but where the petitioner asks for costs against the co-respondent, evidence should be given that the latter was aware that he was intriguing with a married woman, and of the circumstances under which the cohabitation of husband and wife ceased to exist (*n*).

The damages awarded to a petitioner against a co-respondent will not support a petition of bankruptcy against the latter, but they constitute a debt provable in the bankruptcy (*o*). Bankruptcy of co-respondent.

SECTION VI.

Malicious Prosecution.

An action for malicious prosecution may be maintained in cases where it can be shown that the defendant has maliciously instituted criminal proceedings against the plaintiff without reasonable and probable cause, and has thereby inflicted damage upon the plaintiff. In certain cases, an action may also lie where the defendant has merely instituted civil proceedings, *e.g.*, presentation of a bankruptcy or company winding-up petition (*p*), or institution of civil proceedings which affect the plaintiff's reputation or trade credit (*q*), or deprive him of the use of his property (*r*). Basis of cause of action.

Although, in order to maintain this form of action, it is necessary to show that damage has been inflicted upon the plaintiff (*s*), such damage may probably, in all criminal cases and in certain civil cases, be inferred from the surrounding circum-

(*h*) *Narracott v. Narracott*, (1864) 33 L. J. P. & M. 132.

(*i*) *Callwell v. Callwell*, (1860) 3 Sw. & Tr. 259; cf. *Forster v. Forster*, (1865) 4 Sw. & Tr. 131.

(*k*) Cf. *Dale v. Dale*, (1867) 15 L. T. (N. S.) 595.

(*l*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 34.

(*m*) *Evans v. Evans*, (1859) 28 L. J. P. & M. 136.

(*n*) *Boddington v. Boddington*, (1858) 27 L. J. P. & M. 53; cf. *Boyd v. Boyd*, (1859) 1 Sw. & Tr. 562; *Bilby v. Bilby*, [1900] P. 8.

(*o*) *In re O'Gorman*, [1899] 2 Q. B. 62.

(*p*) *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674; *Wyatt v. Palmer*, [1899] 2 Q. B. 106.

(*q*) *Craig v. Hasell*, (1843) 4 Q. B. 481.

(*r*) *Redway v. McAndrew*, (1873) L. R. 9 Q. B. 74.

(*s*) *Byne v. Moore*, (1813) 5 Taunt. 187.

stances (*t*); so that it is doubtful whether an allegation of special damage is really necessary in all cases (*u*).

The mere fact that the plaintiff has been compelled by the defendant to incur certain costs beyond those allowed on taxation in the prior proceedings, will not constitute of itself special damage of such a kind as to render an action maintainable for malicious prosecution (*x*). Nor will mere non-payment of costs, unless the plaintiff has duly endeavoured to recover taxed costs and, having been awarded them, has not obtained them from the defendant (*y*).

The plaintiff must further show that the defendant has acted "from an indirect and improper motive, and not in furtherance of justice" (*z*).

Malice cannot be inferred merely from the absence of reasonable and probable cause (*a*). The existence of malice is a question of fact to be determined by the jury (*b*).

In addition to the factor of malice, there must be proved to have existed no reasonable and probable cause for the defendant's action. The onus of proof lies upon the plaintiff (*c*). It is for the jury to find the facts upon which the question of reasonable and probable cause depends, and for the judge then to decide whether the facts so found constitute reasonable and probable cause (*d*).

There can, of course, be no grounds on which to base an action for malicious prosecution if there existed reasonable and probable cause, no matter how malicious the defendant may have been in instituting the prior proceedings. Therefore no action can lie unless it be proved that the prior proceedings ended in the plaintiff's favour (*e*).

Measure of Damages.

The measure of damages is incapable of precise limitation. This form of action is one in which vindictive damages may be awarded (*f*).

(*t*) Cf. *Savile v. Roberts*, (1699) 1 Ld. Raym. 374, per Holt, C.J., at p. 378; *Quartz Hill Gold Mining Co. v. Eyre*, *ubi supra*.

(*u*) *Wyatt v. Palmer*, *ubi supra*, per Lindley, M.R., at p. 110.

(*x*) *Sinclair v. Eldred*, (1811) 4 Taunt. 7; *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674; overruling *Gould v. Barratt*, (1838) 2 M. & Rob. 171.

(*y*) *Cotterell v. Jones*, (1851) 11 C. B. 713.

(*z*) *Abrath v. N. E. Ry. Co.*, (1883) 11 Q. B. D. 440, per Bowen, L.J., at p. 455.

(*a*) *Brown v. Hawkes*, [1891] 2 Q. B. 718.

(*b*) *Hicks v. Faulkner*, (1878) 8 Q. B. D. 167, per Hawkins, J., at p. 175.

(*c*) *Abrath v. N. E. Ry. Co.*, *ubi supra*.

(*d*) *Hicks v. Faulkner*, *ubi supra*, at p. 175; *Cox v. English, etc. Bank, Ltd.*, [1905] A. C. 168; cf. *Lister v. Perryman*, (1868) L. R. 4 H. L. 521.

(*e*) *Cotterell v. Jones*, (1851) 11 C. B. 713, per Maule, J., at p. 729; cf., however, *Redway v. McAndrew*, (1873) L. R. 9 Q. B. 74; *Steward v. Gromett*, (1859) 7 C. B. N. S. 191.

(*f*) *Hewlett v. Cruchley*, (1813) 5 Taunt. 277; *Leith v. Pope*, (1770) 2 W. Bl. 1327.

If the defendant had maliciously instituted criminal proceedings, naturally the damages would be greater than if he had merely instituted civil proceedings. The rank (*g*) and character and motives (*h*) of the parties may be taken into consideration.

For the purpose of showing that there existed "reasonable and probable cause," and so disposing of the whole cause of action, certain kinds of evidence affecting the plaintiff's character, *e.g.*, a previous conviction for a *similar* offence, might in some cases be given (*i*).

Evidence as to character.

Evidence of the general bad character of the plaintiff, however, is not evidence of "reasonable and probable cause," and therefore affords no complete defence to an action for malicious prosecution (*k*).

No evidence of any kind relating to unpleaded matter, whether affecting character or not, can be tendered merely in mitigation of damages, which, if pleaded, could have afforded a complete defence to the action (*l*).

Thus, evidence of reasonable suspicion may be given in mitigation of damages, but not evidence amounting to a defence by justification (*m*).

Evidence of general good character cannot be tendered in aggravation of damages unless the defendant has offered counter-proof previously (*n*). The plaintiff's character is presumed to be good (*o*). Subject, however, to what has just been said, evidence of general good or bad character is apparently admissible for the purpose of aggravating or mitigating the damages (*p*).

There is, however, great conflict of opinion on the matter, and probably no evidence of general bad character would be admitted, unless the plaintiff sought to recover damages for injury done to his character or reputation (*q*).

Special damages may be recovered if not too remote and if specially pleaded (*r*).

Special damages.

Thus, the costs of prior proceedings instituted by the defendant may be recovered (*s*).

(*g*) *Leith v. Pope*, (1779) 2 W. Bl. 1327.

(*h*) Cf. *Rowcliffe v. Murray*, (1842) 1 Car. & M. 513; cf. *Warwick v. Foulkes*, (1844) 12 M. & W. 507.

(*i*) Cf. *Thomas v. Russell*, (1854) 9 Ex. 764, *per* Pollock, C.B., at p. 765.

(*k*) *Newsam v. Carr*, (1817) 2 Stark. 69; cf. *Downing v. Butcher*, (1841) 2 M. & Rob. 374; *per contra* *Rodriguez v. Tadmire*, (1799) 2 Esp. 721.

(*l*) *Watt v. Watt*, [1905] A. C. 115, at p. 118; *Watson v. Christie*, (1800) 2 B. & P. 224.

(*m*) *Chinn v. Morris*, (1826) 2 C. & P. 361; *Linford v. Lake*, (1858) 3 H. & N. 276; cf., however, *Downing v. Butcher*, *ubi supra*.

(*n*) *Cornwall v. Richardson*, (1825) Ry. & M. 305.

(*o*) *Vide supra*, p. 201.

(*p*) *Vide* Taylor on Evidence (10th ed.), Vol. I., at p. 277; Stephen's Digest of the Law of Evidence (7th ed.), art. 57; cf., however, *Downing v. Butcher*, *ubi supra*; *Jones v. Stevens*, (1822) 11 Price, 235; also Powell on Evidence (9th ed.), at p. 136.

(*q*) *Vide* Addison on Torts (8th ed.), at p. 260.

(*r*) *Fozall v. Barnett*, (1853) 2 E. & B. 928; cf. *Rowlands v. Samuel*, (1847) 11 Q. B. 39; *Redway v. McAndrew*, (1873) L. R. 9 Q. B. 74.

(*s*) *Rowlands v. Samuel*, *ubi supra*. *Vide infra*, p. 306.

But perhaps in many cases, a more satisfactory method of recovering damages for injuries and losses of an indefinite character in this form of action would be to give evidence of them—where permissible (*t*)—in aggravation of general damages—without specially pleading them (*t*).

Distinction between damages for malicious prosecution and for false imprisonment.

The damages recoverable in an action for malicious prosecution are separate and distinct from those recoverable for false imprisonment (*u*). Hence, though both forms of action may lie against the same defendant, the issues upon the heads of damage must not be confused (*u*).

Recovery in one action is no bar to a recovery in the other (*u*).

SECTION VII.

False Imprisonment.

Basis of cause of action.

An action for false imprisonment may be maintained in cases where it can be shown that the defendant has unlawfully detained the person of the plaintiff. A mere partial restraint or hindering will not suffice (*x*). On the other hand, the detention may either be actual or constructive. Thus, an action will lie against an officer who merely tells a person that he is “wanted,” and thereby induces the person to accompany him and resign his liberty (*y*).

In an action for false imprisonment, the onus of proof lies upon the defendant to show that he had reasonable and probable cause. This fact distinguishes this form of action from one for malicious prosecution (*z*). It has been said that “imprisonment is *prima facie* a tort; prosecution is not so in itself” (*a*). A person who institutes a criminal prosecution is not liable for false imprisonment, if it is a judicial officer who actually procures the imprisonment (*b*). Similarly, the prosecutor cannot be held liable for false imprisonment caused by a remand ordered by a magistrate (*c*).

But the prosecutor may be held liable, in an action for malicious prosecution, for injury resulting from a remand.

In an action against a justice of the peace, for any act done in the execution of his duty with respect to any matter within his jurisdiction, there must be an express allegation that the act was

(*t*) *Vide supra*, pp. 2, 198; cf., however, *Millington v. Loring*, (1880) 6 Q. B. D. 190. *Vide infra*, pp. 293—295.

(*u*) *Guest v. Warren*, (1854) 9 Ex. 379.

(*x*) *Bird v. Jones*, (1845) 7 Q. B. 742.

(*y*) *Grainger v. Hill*, (1838) 4 Bing. N. C. 212.

(*z*) *Vide supra*, p. 214.

(*a*) *Panton v. Williams*, (1841) 2 Q. B. 169, *per* Alderson, B., at p. 181.

(*b*) *Austin v. Dowling*, (1870) L. R. 5 C. P. 534, *per* Willes, J., at p. 540.

(*c*) *Lock v. Ashton*, (1848) 12 Q. B. 871.

done maliciously and without reasonable and probable cause (*d*). If the allegation be not proved the plaintiff cannot succeed (*d*).

On the other hand, if the act be done in a matter of which the justice has not jurisdiction or in which he has exceeded his jurisdiction, an action can be maintained without such express allegation; subject, however, to certain preliminary formalities, with regard to the quashing of the prior proceedings, having been complied with (*e*). Furthermore, a plaintiff cannot recover more than twopence damages against a justice, if he was guilty of the offence of which he was convicted, and has undergone no greater punishment than that prescribed by law for his offence (*f*).

Measure of Damages.

The measure of damages, as in actions for malicious prosecution (*g*), cannot be precisely determined.

In appropriate cases, vindictive damages may be awarded (*h*).

The motives actuating the defendant may be regarded (*i*), but no evidence of matters not pleaded can be given merely in mitigation of damages which, if pleaded, would constitute a complete defence to the action (*k*). Thus, evidence of reasonable suspicion may be given in mitigation of damages, but not evidence amounting to a defence by justification (*l*). Motives of defendant.

In one case, evidence of provocation was admitted in mitigation of damages (*m*).

The rules as to the admissibility of evidence of general good or bad character of the plaintiff are the same in actions for false imprisonment as in actions for malicious prosecution. (*Vide supra*, p. 215.) Evidence as to character.

If the defendant not only pleads that he was justified in imprisoning the plaintiff at the time and under the circumstances under which he acted, but also persists in charging the plaintiff with misconduct, such persistence may well entitle the plaintiff to recover greater damages (*n*). Persistence of defendant.

In other words, a prompt withdrawal on the part of the defendant may serve to reduce the damages. But, of course, a

(*d*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1; cf. *Shrobsbery v. Osmaston*, (1877) 37 L. T. 792.

(*e*) Justices Protection Act, 1848, s. 2.

(*f*) Justices Protection Act, 1848, s. 13.

(*g*) *Vide supra*, p. 214.

(*h*) *Edgell v. Francis*, (1840) 1 Man. & G. 222; cf. *Huckle v. Money*, (1763) 2 Wils. 205.

(*i*) *Rowcliffe v. Murray*, (1842) Car. & M. 513.

(*k*) *Watt v. Watt*, [1905] A. C. 115, at p. 118; cf. *Watson v. Christie*, (1800) 2 B. & P. 224.

(*l*) *Chinn v. Morris*, (1826) 2 C. & P. 361; *Linford v. Lake*, (1858) 3 H. & N. 276; cf., however, *Downing v. Butcher*, (1841) 2 M. & Rob. 374.

(*m*) *Thomas v. Powell*, (1837) 7 C. & P. 807.

(*n*) *Warwick v. Foulkes*, (1844) 12 M. & W. 507.

defendant may withdraw all accusations and yet plead by way of a complete defence that he had reasonable and probable cause for the course he took.

Special damages.

Special damages, *e.g.*, money paid to obtain release, may be recovered if specially pleaded (*o*). But they will be disallowed if they are of too remote a character (*p*).

False imprisonment separate from malicious prosecution.

In an action for false imprisonment no damages can be claimed or given in respect of injury resulting from a simultaneous or subsequent prosecution. The two causes of action are entirely separate and distinct (*q*).

SECTION VIII.

Assault and Battery.

Definition.

Assault is the unlawful laying of hands upon the person of another, or an attempt to inflict upon him some corporal injury, coupled with present ability and intention to do so (*r*).

Battery is the actual striking of another person or touching him in an angry or insolent manner.

Both assault and battery may in fit and proper circumstances be justified, *e.g.*, in self-defence (*s*), or on adequate provocation (*t*). In such cases no damages are recoverable.

Measure of Damages.

The measure of damages is very much "at large." The rank and motives of the parties, the circumstances connected with the assault, and the degree of personal insult may all be regarded (*u*).

Vindictive damages may be awarded (*y*).

Joint tortfeasors.

In a case of joint assault, however, in which one of two defendants has been actuated by a greater degree of malice than the other, aggravated damages should not be awarded against the more innocent party (*z*).

Special damages.

Special damages may be recovered if they are not too remote (*a*).

(*o*) *Pritchett v. Boevey*, (1833) 1 Cr. & M. 775, at p. 778; *Clark v. Woods*, (1848) 17 L. J. M. C. 189; cf. *Foxall v. Barnett*, (1853) 2 E. & B. 928; *Norton v. Monckton*, (1895) 11 T. L. R. 242. *Vide infra*, p. 306.

(*p*) *Boyce v. Bayliffe*, (1807) 1 Camp. 58; cf. *Glover v. L. & S. W. Ry. Co.*, (1867) L. R. 3 Q. B. 25.

(*q*) *Guest v. Warren*, (1854) 9 Ex. 379.

(*r*) Cf. *Read v. Coker*, (1853) 13 C. B. 850.

(*s*) *Oakes v. Wood*, (1837) 3 M. & W. 150.

(*t*) *Dale v. Wood*, (1822) 7 Moore, 33; cf., however, *Cockcroft v. Smith*, (1706) 2 Salk. 642, *per Holt*, C.J.

(*u*) Cf. *Tullidge v. Wade*, (1769) 3 Wils. 18, *per Bathurst*, J., at p. 19; *James v. Campbell*, (1832) 5 C. & P. 372; *Fraser v. Berkeley*, (1836) 7 C. & P. 621; *Linford v. Lake*, (1858) 3 H. & N. 276.

(*y*) *Merest v. Harvey*, (1814) 5 Taunt. 442, *per Heath*, J., at p. 443.

(*z*) *Clark v. Newsam*, (1847) 1 Exch. 131, at pp. 139 and 140; cf. *Gregory v. Cotterell*, (1852) 22 L. J. Q. B. 217. *Vide infra*, p. 300.

(*a*) Cf. *Boyce v. Bayliffe*, (1807) 1 Camp. 58; *Glover v. L. & S. W. Ry. Co.*, (1867) L. R. 3 Q. B. 25.

It would appear that damages might be recovered for physical injury caused merely by fright without physical impact (*b*).

If the assault cause bodily disablement, *i.e.*, if it constitute mayhem, the damages recoverable in respect merely of the resulting incapacity would be governed on the same principles as in an action for personal injuries arising through negligence (*c*). Mayhem.

But, of course, the damages would not be limited to the damages to be awarded under that head.

It is difficult to see how the question of the plaintiff's general character can become relevant in an action for assault, but there is authority for the contention that evidence with regard to it may be given in order to mitigate the damages (*d*). If at the trial the plaintiff lays great stress upon the injury caused to his reputation by the indignity to which he has been subjected, conceivably, it might be permissible to offer rebutting evidence as to his general bad character. Evidence as to character.

SECTION IX.

Fraud.

No action for fraud can be maintained without proof of consequent damage resulting to the plaintiff. It has been said that "fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies" (*e*). The injury done to the plaintiff constitutes the gist of the action (*f*).

Basis of cause of action.

It is enacted, by the statute known as Lord Tenterden's Act (*g*), that no representation as to a person's conduct, credit, character, ability, etc., shall be actionable in fraud, unless such representation be in writing and signed by the defendant. The statute apparently applies only to statements really going to the assurance of personal credit (*h*).

Measure of Damages.

The damages recoverable are the loss inflicted upon the plaintiff, as a natural and reasonable consequence of the defendant's deceit. Any benefit received by the plaintiff under a fraudulent contract must be taken into account, and the damages recoverable will merely consist of the actual resulting loss (*i*).

Damages limited to actual loss.

(*b*) Cf. *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Dulieu v. White*, [1901] 2 K. B. 669.

(*c*) *Vide supra*, p. 195.

(*d*) *Vide supra*, p. 215.

(*e*) *Pasley v. Freeman*, (1789) 3 T. R. 51, *per* Buller, J., at p. 56; cf. *Eastwood v. Bain*, (1858) 3 H. & N. 738.

(*f*) Cf. *Pasley v. Freeman*, *ubi supra*, *per* Ashurst, J., at p. 62.

(*g*) 9 Geo. 4, c. 14, s. 6.

(*h*) Cf. *Lyde v. Barnard*, (1836) 1 M. & W. 101, *per* Parke and Alderson, BB.

(*i*) *Hogan v. Healey*, (1877) 1. R. 11 C. L. 122.

Thus, the amount of damages recoverable by a plaintiff who sues in respect of fraudulent statements contained in a company prospectus is the difference between the price paid by him for the shares and the real value of the shares at the date of allotment (*k*), or the day after (*l*).

Such value must be ascertained not necessarily by the market value of the shares at that date (*m*), but by the light of subsequent events, including—it may be—the result of the winding up of the company (*n*). But no damages can be recovered in respect of loss accruing after the discovery of the fraud, when the plaintiff might have rescinded the contract (*n*); neither can damages be recovered in respect of prospective gains which the plaintiff had hoped to secure (*o*).

Action by
company
against
promoters.

In one case of fraud brought by a company against its promoters, the measure of damages was declared to be the profit which the promoters had made upon the purchase and resale of certain property—which purchase and resale had been fraudulently concealed (*p*).

In an action against directors for breach of an implied warranty of authority to give debenture stock, the measure of damages is the value of the stock which the plaintiff ought to have received (*q*).

Remoteness
of damage.

The special damage alleged to have been incurred must not, of course, be of too remote a character (*r*). It has, however, been held that a defendant, who fraudulently represented that a certain cow was free from disease, could be mulcted in respect of loss incurred through the death of other cows of the plaintiff, which had become infected by the diseased cow sold by the defendant (*s*). Also, a defendant may be liable in fraud for representations not made directly to the person injured, if the defendant, in fact, intended such person to act upon the false statement (*t*).

Bribery.

If an agent, who has been purposely bribed by a third party, induces his principal to enter into a contract with such third party, the principal may either (1) recover the bribe from his

(*k*) *Peck v. Derry*, (1887) 37 Ch. D. 541, *per* Cotton, L.J., at p. 593; *McConnell v. Wright*, [1903] 1 Ch. 546, *per* Collins, M.R., at p. 553; *cf. Stevens v. Hoare*, (1904) 20 T. L. R. 407, *per* Joyce, J., at p. 409.

(*l*) *Cackett v. Keswick*, [1902] 2 Ch. 456, *per* Farwell, J., at p. 468.

(*m*) *Cf. Twycross v. Grant*, (1877) 2 C. P. D. 469, *per* Lord Coleridge, at p. 489; *Davidson v. Tulloch*, (1860) 3 Macq. H. L. 783.

(*n*) *Peck v. Derry*, *ubi supra*, at pp. 593 and 594; *cf. Jury v. Stoker*, (1881) 9 L. R. Ir. 385.

(*o*) *McConnell v. Wright*, *ubi supra*, *per* Collins, M.R., at p. 554.

(*p*) *In re Leeds and Hanley Theatre*, [1902] 2 Ch. 809.

(*q*) *Firbank's Exors. v. Humphreys*, (1886) 18 Q. B. D. 54, at p. 62.

(*r*) *Cf. Barry v. Croskey*, (1861) 2 Jo. & H. 1, at p. 23; *Collins v. Cave*, (1859) 4 H. & N. 225; *Barber v. Lesiter*, (1859) 7 C. B. N. S. 175; *Hyde v. Bulmer*, (1868) 18 L. T. 293; *Angus v. Clifford*, [1891] 2 Ch. 449, at p. 481.

(*s*) *Mullett v. Mason*, (1866) L. R. 1 C. P. 559; *cf. Randall v. Newson*, (1877) 2 Q. B. D. 102; *Bostock v. Nicholson*, [1904] 1 K. B. 725.

(*t*) *Langridge v. Levy*, (1838) 4 M. & W. 337; *cf. Andrews v. Mockford*, [1896] 1 Q. B. 372.

agent, or (2) recover from the agent and the third party, jointly and severally, damages for loss sustained in consequence and arising out of such contract, without any deduction in respect of the bribe which the principal may have recovered previously (*u*). The principal may pursue both the above remedies, and, since the second remedy is several in character, a discharge of the claim against the agent is no bar to a claim against the third party (*u*).

Nothing in the nature of general damages is recoverable in an action for fraud, nor can vindictive damages be awarded. Even in a very gross case, the utmost resort that the court could indulge in, by way of penalising the defendant, would be to construe liberally the principles relating to remoteness of special damage (*x*).

General or vindictive damages not recoverable.

SECTION X.

Actions against Sheriffs, Solicitors, and Witnesses.

Actions against Sheriffs.

Action by Creditor.—Where a sheriff has been guilty of a dereliction of duty towards a creditor, the latter is entitled, in accordance with the general law of tort, to be placed, so far as the awarding of damages can place him, in the same position as if the sheriff had properly performed the duties of his office.

Thus, where a creditor secures a writ of *fiery facias*, and the sheriff makes a false return as to the debtor's goods, the creditor, in an action against the sheriff for false return, may recover as damages such sum as would have been recovered had a proper levy been executed upon the debtor's goods (*y*). *Primâ facie*, the measure of damage is the value of the goods which might have been levied (*z*)—not exceeding the amount of the debt; but all the circumstances of the case must be looked to, in order to ascertain whether or not the creditor's claim might have been defeated even though the sheriff had duly performed his functions (*z*).

Duties in connection with writ of *fiery facias*.

Special damage must be alleged and proved, to maintain an action against a sheriff for false return (*a*), or for delay in executing a writ of *fiery facias* (*b*), or for delay in returning the

(*u*) *Salford (Mayor of) v. Lever*, [1891] 1 Q. B. 168.

(*x*) Cf. *Lumley v. Gye*, (1853) 2 E. & B. 216, *per* Crompton, J., at p. 230

(*y*) Cf. *Crowder v. Long*, (1828) 8 B. & C. 598.

(*z*) Cf. *Hobson v. Thellusson*, (1867) 8 B. & S. 476; *Todd v. Pratt*, (1877) Ir. R. 11 C. L. 473.

(*a*) *Levy v. Hale*, (1859) 1 L. T. 132; *O'Dowd v. Kirwan*, (1877) Ir. R. 11 C. L. 75; *Todd v. Pratt*, *ibid.* at p. 473; *Stimson v. Farnham*, (1871) L. R. 7 Q. B. 175; cf., also, *Tancred v. Allgood*, (1859) 4 H. & N. 438.

(*b*) *Bales v. Wingfield*, (1833) 4 Q. B. 580; cf., however, *Clifton v. Hooper*, (1844) 6 Q. B. 468.

writ (*c*). If the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the damages (*d*). But it is not, apparently, necessary to prove special damage in actions for not levying execution at all (*e*), or for permitting a debtor to escape (*f*).

Duties in connection with replevin bonds.

It is provided by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 134 (and also by 19 & 20 Vict. c. 108), that the duties formerly exercised by sheriffs with regard to replevin bonds and replevins are to be performed by the registrar of the court of the district.

Consequently, the latter may become liable for improper or negligent performance of such duties.

Liability of registrar.

In an action against a registrar for taking an insufficient or invalid replevin bond, or for not taking a bond at all, it would appear that the measure of damages is the amount of the rent due, together with the expenses of distress (*g*).

If the sureties on the bond have been unsuccessfully sued, even without notice to the registrar, the plaintiff may recover the costs from the registrar, provided their amount, together with the other damages proved, does not exceed the penalty of the bond (*h*).

In taking sureties, the registrar must exercise a reasonable discretion in deciding upon their sufficiency, and it is for the court to determine whether he has, or has not, fulfilled such duty (*i*).

Payment of money after return of writ.

After a return to a *fi. fa.* that the money is levied, the sheriff is liable to an action for it, without any demand of payment (*k*), but the court may stay proceedings upon payment of the amount without costs (*l*).

Sheriffs Act, 1887.

It is provided by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 16, that if a person in the custody of the sheriff, or any of his officers, or of any other person, either in execution, or for non-performance, of a judgment or order of the High Court of Justice, or for contempt of that court, or otherwise in the course of a civil proceeding, escapes out of legal custody, such sheriff or other person shall be liable to pay the damages sustained by the person at whose suit such prisoner was taken into custody, and

Damages for escape.

(*c*) Cf. *R. v. Sheriff of Essex*, (1836) 1 M. & W. 720.

(*d*) *Mason v. Paynter*, (1841) 1 Q. B. 974.

(*e*) *Mullett v. Challis*, (1851) 16 Q. B. 239.

(*f*) Cf. *Clifton v. Hooper*, (1844) 6 Q. B. 468. *Vide infra*, pp. 222, 223.

(*g*) *Edmonds v. Challis*, (1849) 7 C. B. 413; cf. *Perreau v. Bevan*, (1826) 5 B. & C. 284; *Paul v. Goodluck*, (1835) 2 Bing. N. C. 220.

(*h*) *Plumer v. Briscoe*, (1847) 11 Q. B. 46; cf. *Baker v. Garratt*, (1825) 3 Bing. 56.

(*i*) *Jeffery v. Bastard*, (1836) 4 A. & E. 823; cf. *Plumer v. Briscoe*, *ubi supra*.

(*k*) *Dale v. Birch*, (1813) 3 Camp. 347.

(*l*) *Jefferies v. Sheppard*, (1820) 3 B. & Ald. 696.

all costs of any action or other proceeding to recover the same, but not for any further sum (*m*).

The measure of damages, subject to the above provision, is the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape; but, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages will be materially affected by such conduct (*n*).

Action by Debtor.—It is provided by the Extortion Act, 1587 (29 Eliz. c. 4), s. 1, that any sheriff, or similar officer, who takes, or receives, in respect of the serving and executing of a writ of execution, greater poundage fees than those specified in the Act shall forfeit to the party grieved treble damages in addition to the payment of a penalty. Section 2 of the Act provides that the Act does not apply to cities and towns.

Extortion
Act, 1587.

Treble
damages.

In cases to which the Act applies, if the jury find the actual or single damage expressly, then the plaintiff is entitled to the treble amount of such sum (*o*).

The above statute is modified, but not repealed, by the Execution of Civil Process Act, 1837 (7 Will. 4 & 1 Vict. c. 55), which makes a sheriff, or similar officer, liable to contempt of court if guilty of extortion, and which also provides that the fees payable shall be regulated by the taxing officer, acting under judicial sanction and authority (*p*).

Execution of
Civil Process
Act, 1837.

For the measure of damages recoverable by a debtor, in respect of trespass committed by a sheriff, the reader is referred to the section dealing with trespass to goods (*q*).

Trespass.

Actions against Solicitors.

Solicitors are impliedly bound to bring and exercise a reasonable degree of skill, care, and knowledge in the performance of their professional duties. Consequently, if a solicitor through negligence, or default, has, in the opinion of the court, prejudiced his client's interests, the client is entitled to such damages as will adequately compensate him. But, as is the case in other forms of action for negligence,

Measure of
damages.

(*m*) Cf. *Williams v. Mostyn*, (1838) 4 M. & W. 145, at p. 153; *Clifton v. Hooper* (1844) 6 Q. B. 468.

(*n*) *Arden v. Goodacre*, (1851) 11 C. B. 371, at pp. 375—378; cf. *R. v. Leicestershire Sheriff*, (1850) 9 C. B. 659; *Moore v. Moore*, (1858) 25 Beav. 8; *Macrae v. Clark*, (1866) L. R. 1 C. P. 403; *Hemming v. Hale*, (1859) 7 C. B. N. S. 487.

(*o*) *Buckle v. Bewes*, (1825) 4 B. & C. 154; cf. *Masters v. Farris*, (1845) 1 C. B. 715.

(*p*) *Wrightup v. Greenacre*, (1847) 10 Q. B. 1; *Pilkington v. Cooke*, (1847) 16 M. & W. 615.

(*q*) *Vide supra*, p. 109.

the plaintiff can only recover special damages(*r*). He cannot recover vindictive damages; though, presumably, since a solicitor acts under a contract or retainer, a client could recover nominal damages for negligence, even though no actual damage be proved(*s*).

When action will lie.

It is a question of fact, to be determined by the court in each case, whether the defendant has been guilty of negligence(*t*). A solicitor is not deemed to be omniscient, and if reasonably skilful and prudent, will not be deemed liable for acts or omissions which may eventually turn out to be prejudicial to his client(*u*). But he is liable for negligence in connection with matters within the ordinary course of a solicitor's work(*x*).

Liability for slander.

No action of any kind can be maintained against a solicitor or barrister in respect of words uttered by him as an advocate before a court of justice, in regard to the subject-matter of the inquiry, and probably not even in regard to irrelevant matters(*y*).

The liability attaching to a solicitor is further dealt with in the section on principal and agent (*Vide* Ch. XI., s. 1).

Actions against Witnesses.

Immunity in respect of defamation.

Witnesses in a court of justice are absolutely privileged as to anything they may say as witnesses, having reference to the inquiry upon which they are called as witnesses(*z*). Consequently, no action for defamation can be maintained against them in respect of statements made by them in the course of giving legitimate evidence(*z*), and it is even doubtful whether they could be sued for making wholly irrelevant and defamatory statements whilst on oath(*a*).

Liability for non-attendance after subpoena.

A witness who has been duly served with a subpoena and has had his legitimate expenses tendered renders himself liable, upon neglecting to attend the court to give evidence, to an action for damages at common law, or to an action for the recovery of a penalty and compensation by virtue of 5 Eliz., c. 9, s. 12, or to proceedings by attachment.

(*r*) *Whiteman v. Hawkins*, (1878) 4 C. P. D. 13.

(*s*) *Godefroy v. Jay*, (1831) 7 Bing. 413, *per* Tindal, C.J., at p. 419; *Fray v. Voules*, (1859) 1 E. & E. 839; *Cockburn v. Edwards*, (1881) 18 Ch. D. 449; *cf. Columbus Co., Ltd. v. Clowes*, [1903] 1 K. B. 244; *cf.*, however, *Lee v. Ayrton*, (1792) Peake, 119; *Harrington v. Binns*, (1863) 3 F. & F. 942. *Vide supra*, pp. 2, 10.

(*t*) *Kemp v. Burt*, (1833) 4 B. & Ad. 424; *Montrieu v. Jefferys*, (1825) 2 C. & P. 113.

(*u*) *Godefroy v. Dalton*, (1830) 6 Bing. 460; *Kemp v. Burt*, *ubi supra*; *cf. Chapman v. Van Toll*, (1857) 8 E. & B. 396.

(*x*) *Cf. Hawkins v. Harwood*, (1849) 4 Exch. 503; *Hunter v. Caldwell*, (1847) 10 Q. B. 69, at p. 83; *Bean v. Wade*, (1885) 2 T. L. R. 157; *Blyth v. Fladgate*, [1891] 1 Ch. 337.

(*y*) *Munster v. Lamb*, (1883) 11 Q. B. D. 588, at p. 605; *cf. Seaman v. Netherclift*, (1876) 2 C. P. D. 53, at p. 60.

(*z*) *Seaman v. Netherclift*, (1876) 2 C. P. D. 53; *cf. Munster v. Lamb*, (1883) 11 Q. B. D. 588; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

(*a*) *Cf. Seaman v. Netherclift*, *ubi supra*, at p. 60.

An action for damages at common law, for non-attendance of a witness summoned by subpoena, is an action for a breach of duty for disobeying the order of a competent authority, and proof of the existence of actual or special damage is essential, since the law will not imply a loss to the plaintiff from mere disobedience to the subpoena (*b*).

If, however, the witness has contracted to appear, no subpoena is necessary, and no proof of special damage is necessary—at all events to entitle the plaintiff to nominal damages (*c*).

It is a sufficient allegation of special damage to show that the defendant's evidence would have been material upon any one of the issues raised in the original action, without alleging or showing that the plaintiff had a good general cause of action (*d*). Special damage.

It is not necessary, in order to maintain this form of action, for the plaintiff to have been nonsuited, or for the case to have been called on, or the jury sworn (*e*).

Consequently, if a party to an action, whether plaintiff or defendant, in the absence of a material witness subpoenaed by him, withdraws the record, by leave of the court if he be the plaintiff (*f*), or applies for a postponement if he be the defendant, he can recover from the defaulting witness all such costs as he has been compelled to pay to the opposite party, and which he has himself had to incur, in connection with such proceedings as the witness has rendered abortive (*g*). Recovery of wasted costs.

If the action does go to trial in the witness's absence, it would appear that substantial damages might be recovered without proof that the plaintiff would have inevitably succeeded in his original action had the witness been present (*h*).

It is provided by the Act of Elizabeth referred to above, 1562 (5 Eliz. c. 9), s. 12, that if a person, upon whom any process out of any of the courts of record shall be served to testify concerning any cause or matter in any of the same courts, and who has been tendered reasonable expenses, defaults without reasonable excuse, he shall forfeit 10*l.*, and yield such further recompense to the party grieved as shall be awarded by the discretion of the judge of the court out of which the said process issued, according to the loss and hindrance that the party shall sustain by reason of the witness's non-appearance. 5 Eliz. c. 9.

(*b*) *Crewe v. Field*, (1896) 12 T. L. R. 405, *per* Bruce, J., at p. 405.

(*c*) *Yeatman v. Dempsey*, (1860) 7 C. B. N. S. 628; *Crewe v. Field*, *ubi supra*, at p. 406.

(*d*) *Couling v. Cox*, (1848) 6 C. B. 703; *cf.* *Masterman v. Judson*, (1832) 8 Bing. 224; *Yeatman v. Dempsey*, *ubi supra*, and 9 C. B. N. S. 881.

(*e*) *Mullett v. Hunt*, (1833) 1 C. & M. 752; *Lamont v. Crook*, (1840) 6 M. & W. 615; overruling *Bland v. Swafford*, (1791) Peake, 60.

(*f*) *Cf.* R. S. C., Ord. XXVI., r. 1.

(*g*) *Needham v. Fraser*, (1845) 1 C. B. 815, at p. 818; *cf.* *Brown v. Murray*, (1824) 4 D. & R. 830.

(*h*) *Yeatman v. Dempsey*, (1860) 7 C. B. N. S. 628; 9 C. B. N. S. 881.

Compensation
alternative to
damages.

It is to be observed that the compensation recoverable under this statute is not to be assessed by the jury, nor the judge who tries the cause, but by the court out of which the process issues (*i*), and an action for debt will lie upon such assessment (*i*). It is not intended that such remedy should be availed of in addition to an action at common law (*i*).

(*i*) Cf. *Pearson v. Iles*, (1781) 2 Doug. 556, *per* Lord Mansfield, at p. 561.

CHAPTER X.

Statutory Damages and Compensation.

- Section I.—Lands Clauses Acts.
 „ II.—Lord Campbell's Act, 1846.
 „ III.—Employers' Liability Act, 1880.
 „ IV.—Workmen's Compensation Act, 1906.
 „ V.—Agricultural Holdings Act, 1908.
 „ VI.—Actions for Breach of Statutory Duty and for Statutory Penalties.

SECTION I.

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Lands Clauses Acts.

Lands Clauses Consolidation Act, 1845.

THE Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), consolidates, into one Act, certain provisions to be thereafter incorporated, wholly or in part, into all statutes subsequent to 1845 relating to the acquisition of lands required for works or projects of a public (*a*) character. These provisions deal—*inter alia*—with the compensation to be made to the owners of, or occupiers of, or parties interested in, such lands, or in lands adjacent, for any damage sustained by them by the execution of such works as may be authorised by statute. Introductory.

Compulsory powers over land may be acquired in one of three ways :

- (1) By the passing of a public general Act ;
- (2) by promoting a private Bill which when passed becomes a local and personal Act ;
- (3) by proceeding under existing Acts to obtain an order, which is commonly referred to as a provisional order (*b*).

The Act of 1845 has been amended by four subsequent Acts, namely, the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), the Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15), and the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11).

(*a*) Cf. *Wale v. Westminster Palace Hotel*, (1860) 8 C. B. N. S. 276.

(*b*) Cf. Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176.

The Act of 1845, however, together with these amending Acts, and any amending Acts for the time being in force, are to be designated as regards England and Wales as the "Lands Clauses Acts" (c).

It may be convenient in any particular "special Act" for the promotion of an undertaking to incorporate only a portion of the Lands Clauses Act, or to vary its provisions, and this may accordingly be done (d).

Where land is taken or injuriously affected by the promoters of an undertaking duly, and without negligence, carried out in accordance with an empowering statute, no compensation can be recovered by any one sustaining damage thereby, unless the statute so provides (e).

Where, however, the promoters of an undertaking, which is authorised by the Lands Clauses Acts, or any Act incorporated therewith, require to purchase or take any lands, all the parties who possess interests in such lands, of which they are deprived, are entitled to compensation (f).

The interests, however, must be real in character, and must not consist merely of personal rights or interests in chattels (g).

A claimant, having only an equitable interest in the property concerned, may obtain compensation, though the insecurity of his tenure would be a relevant factor for consideration in the determination of the amount due (h).

Section 68 of the Lands Clauses Consolidation Act, 1845, provides that a party entitled to compensation under the Act may, if the compensation claimed exceed 50*l.*, have the same settled either by arbitration or by the verdict of a jury—at the party's option.

Measure of Compensation.

Basis of compensation.

The principle of compensation is indemnity to the owner, and the basis on which all compensation for lands required or taken should be assessed is their value to the owner as at the date of the notice to treat, and not their value to the promoters when taken (i).

Relevant factors.

Although the value of the land to the owner is to be taken as at the date of the notice to treat, in determining that value the

(c) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23.

(d) Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 1.

(e) *East Freemantle Corporation v. Annois*, [1902] A. C. 213, at p. 217; cf. *L. B. & S. C. Ry. Co. v. Truman*, (1885) 11 App. Cas. 45.

(f) Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 18.

(g) *New River Co. v. Midland Ry. Co.*, (1877) 36 L. T. 539; *Clout v. Metropolitan & D. Rys. Joint Committee*, (1883) 48 L. T. 257.

(h) *In re N. L. Ry. Co., Ex parte Cooper*, (1865) 34 L. J. Ch. 373, 375; *Martin v. L. C. & D. Ry. Co.*, (1866) 1 Ch. App. 501.

(i) *Stebbing v. Metropolitan Board of Works*, (1870) L. R. 6 Q. B. 37; cf. *Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co.*, [1903] A. C. 426, per Lord Macnaghten, at p. 431; *Mercer v. Liverpool, St. Helen's and S. L. Ry. Co.*, [1904] A. C. 461.

potential value of the land should be taken into account—that is to say, its present value for future purposes (*k*).

In estimating the value of the land to the owner, such factors as costs of removal (*l*), loss sustained prior to obtaining other premises (*m*), the value of fixtures (*n*), loss of business and goodwill (*o*), may all, in proper circumstances, be duly considered.

The fact that a business is carried on at a loss will not necessarily disentitle the owner to compensation, since the business might improve (*m*).

The compensation, it will be observed, must cover all loss directly sustained by the compulsory process of expulsion, and is in principle analogous to that given in an action for trespass (*p*), except that, of course, nothing in the nature of vindictive damages can be awarded.

Hence, compensation is not payable in respect of damage which would be deemed too remote in an action for trespass (*q*).

Collateral rights, incidental to the ownership or occupation of the land, may well form subjects for consideration, in determining the compensation payable in respect of the land to which they are annexed (*r*).

Collateral rights.

Where land is subject to a lease, the purchase-money payable to the lessee or tenant depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued, which will depend upon the character of the property and the length of the term of tenancy.

Compensation payable to lessee.

Even a tenant from year to year is entitled not only to receive compensation for the value of his unexpired term (*s*), but also for every kind of damage or loss which he may directly suffer (*t*).

In assessing the value of land taken under compulsory process, it is customary to make an addition of 10 per cent. There is no provision in the Lands Clauses Act, 1845, entitling a claimant to

10 per cent. addition for compulsory purchase.

(*k*) *Hilcoat v. Archbishops of Canterbury and York*, (1850) 10 C. B. 327; *Bailey v. Isle of Thanet Light Rys.*, [1900] 1 Q. B. 722; *In re City and S. L. Ry. Co. and the Rector, etc. of St. Mary, Woolnoth*, [1903] 2 K. B. 728; [1905] A. C. 1; *In re Gough and Aspatia, etc. Water Board*, [1904] 1 K. B. 417.

(*l*) *Morgan v. Metropolitan Ry. Co.*, (1868) L. R. 4 C. P. 97.

(*m*) *Jubb v. Hull Dock Co.*, (1846) 9 Q. B. 443; cf. *M. D. Ry. Co. v. Burrow*, *Times Newspaper*, 22nd Nov., 1894.

(*n*) *Gibson v. Hammersmith Ry. Co.*, (1863) 32 L. J. Ch. 337.

(*o*) *Cooper v. Metropolitan Board of Works*, (1883) 25 Ch. D. 472; cf. *Morgan v. Metropolitan Ry. Co.*, *ubi supra*.

(*p*) *Rickets v. Metropolitan Ry. Co.*, (1865) 34 L. J. Q. B. 257, *per Erle, C.J.*, at p. 261.

(*q*) Cf. *R. v. Vaughan*, (1868) L. R. 4 Q. B. 190; *Re Kilworth Rifle Range*, [1899] 2 Ir. R. 305. See, however, note (*a*), p. 230, and note (*u*), p. 232.

(*r*) *Belton v. London County Council*, (1893) 68 L. T. 411; *Re Chandler's Wiltshire Brewery Co.*, [1903] 1 K. B. 569; cf. *Blantyre v. Babbie*, (1888) 13 App. Cas. 631.

(*s*) *Lands Clauses Act*, 1845, s. 121.

(*t*) *R. v. G. N. Ry. Co.*, (1876) 2 Q. B. D. 151, *per Lush, J.*, at p. 156.

such addition. It can only be justified as a part of the valuation and not as an addition thereto. An addition of 20 per cent. has been expressly disapproved (*u*). In certain public Acts it is expressly provided that no additional allowance shall be made for compulsory purchase (*x*).

In practice, the 10 per cent. is applied merely to the valuation of the land, and not to consequential damage. It may be regarded as covering various incidental expenses and charges to which the deprived owner is subjected. If no general 10 per cent. allowance be made for such expenses incidental to compulsory eviction, each individual item thereof would have to be considered in making the assessment.

*Damage to other Lands of Owner from whom some
Land is taken.*

Furthermore, in estimating the compensation to be paid for lands purchased or taken, regard must be paid to the damage—if any—sustained by the owner by reason of the severing of the lands taken from the other lands of such owner, or otherwise by the injuriously affecting of such other lands, by the exercise of the powers of the special Act or any Act incorporated therewith (*y*).

Basis of compensation.

The compensation payable for severance should be calculated upon the basis of both the present and the prospective use of the land retained by the owner (*z*).

The measure of such compensation is full compensation for all damage actually suffered as a direct consequence, and not merely for strictly legal damage (*a*). Every item need not by itself be actionable (*a*).

Finality of assessment.

Where lands are purchased and taken, it is enacted by the Lands Clauses Act, 1845, ss. 49 and 63, that all damage to be sustained by the same owner, in respect of other lands held therewith, shall be assessed at the same time, though separately, as that at which the purchased lands are valued. Future damage capable of being foreseen can and must be included, and no future claim in respect thereof can be made (*b*).

Possibly, however, a second claim for compensation might be

(*u*) *In re Athlone Rifle Range*, [1902] 1 Ir. R. 433.

(*x*) Cf. Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 21 (*a*).

(*y*) Lands Clauses Act, 1845, ss. 63 and 49; cf. *Holt v. Gas Light and Coke Co.*, (1872) L. R. 7 Q. B. 728, *per* Blackburn, J., at p. 736.

(*z*) *Buckleuch v. Metropolitan Board of Works*, (1872) L. R. 5 H. L. 418; *R. v. Brown*, (1867) L. R. 2 Q. B. 630.

(*a*) *In re London, T. & S. Ry. Co. and Gower's Walk Schools (Trustees)*, (1889) 24 Q. B. D. 326, at p. 332.

(*b*) *Caledonian Ry. Co. v. Lockhart*, (1860) 3 Macq. H. L. 808; *Croft v. L. & N. W. Ry. Co.*, (1863) 32 L. J. Q. B. 113; cf. *Mercer v. Liverpool, St. Helen's and S. L. Ry. Co.*, [1904] A. C. 461.

made in cases of subsequent damage occurring which was neither "foreseen nor even guessed at" (c).

If the undertaking enhances the value of a part of the owner's property, but injury results to another part of it by severance or by some injurious affection incidental to the undertaking, the owner cannot be compelled to deduct from his compensation claim any sum in respect of the enhanced value (d).

Partial betterment immaterial.

In cases where some land is taken from an owner and injury results to land retained by him in consequence of the carrying on of the undertaking, the owner cannot recover compensation, if injury is caused by the use of works constructed on land obtained for the purpose of the undertaking from other owners, and not actually upon the land obtained from him (e).

Distinction between damage arising from "carrying on" and "execution" of undertaking.

An owner of land retained in part is entitled to compensation for the use to which the land taken from him is put in carrying on the undertaking (f); whereas a mere owner of adjacent land—none of whose land is actually taken—can only claim damages, if at all, for the construction of works for the undertaking, and can recover none in respect of their use (g).

In the case of lands taken, which are subject to a lease, if a part only of the lands comprised in the lease is required for the purposes of the promoters, the rent payable in respect of the lands in such lease is apportioned between the lands so required and the residue.

Apportionment of rent.

The apportionment may be settled by agreement between the lessor and lessee of such lands and the promoters, or failing agreement by two justices (h).

The arbitrator who assesses the compensation payable to the tenant cannot make the apportionment (i).

Tenants are to be compensated for the severance of their lands or for loss occasioned otherwise by the execution of the works (k).

Tenants' rights to compensation.

Damage to Lands of Owner from whom no Land is taken.

In cases where no land has been taken from a particular owner, but that owner possesses lands or interests therein which have been

(c) *Lawrence v. G. N. Ry. Co.*, (1851) 16 Q. B. 643, *per* Patteson, J., at p. 652; *Regent's Canal Co. v. Ware*, (1854) 9 Ex. 395, *per* Pollock, C.B.; cf. Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 81.

(d) Cf. *Eagle v. Charing Cross Ry. Co.*, (1867) L. R. 2 C. P. 638.

(e) *Caledonian Ry. Co. v. Ogilvie*, (1856) 2 Macq. H. L. 229; *R. v. Mountford*, [1906] 2 K. B. 814; *Horton v. Colwyn U. C.*, [1908] 1 K. B. 327.

(f) *Cowper Essex v. Acton Local Board*, (1889) 14 App. Cas. 153, at pp. 161 and 178.

(g) *Hammersmith Ry. Co. v. Brand*, (1869) L. R. 4 H. L. 171. *Vide infra*, p. 232.

(h) Lands Clauses Act, 1845, s. 119.

(i) *Re Ware and Regent's Canal Co.*, (1854) 9 Ex. 395.

(k) Lands Clauses Act, 1845, s. 120.

injuriously affected by the execution of works, the promoters of the undertaking are liable to compensate such owner (*l*).

An owner of land which is injuriously affected by the execution of works upon the land not taken from him is in the same position, so far as compensation for such injurious affection is concerned, whether or not he has sold other land to the promoters of the undertaking (*m*).

Compensation only payable for damage caused by "execution" of undertaking.

For such compensation to be payable, three conditions must be fulfilled :

(1) The damage must be sustained through the lawful exercise of the statutory powers of the promoters (*n*).

(2) The damage must arise by reason of the execution of the works, and not from the use of them when executed (*o*).

(3) The damage must be of such a kind as would have been actionable if it had not been done in the exercise of the statutory power conferred (*p*). Hence, damage of such a kind as would be deemed too remote to be recovered by action cannot constitute a valid claim for compensation (*q*).

If the promoters of an undertaking exceed their powers, or exercise them in a negligent manner, the party injured will have a remedy by action, and the bringing of an action is the appropriate remedy to pursue (*r*).

It follows, from what has just been stated, that the promoters of an undertaking may use land adjoining other land in any manner in which the original owner could have used it, without giving the owners of the adjoining land any right whatever to compensation (*s*); but they cannot exercise their powers in a negligent manner (*t*).

Basis of claim must be actionable but not necessarily every item.

If a person has a valid claim under section 68 of the Lands Clauses Act, 1845 (*vide supra*, pp. 231, 232), the measure of compensation due to him is full compensation for all such damage as would not be regarded as too remote in an action of tort. It is important to observe that, notwithstanding what has been stated with regard to the necessity for the claim to be actionable, every item of damage incurred need not in itself be actionable (*u*).

(*l*) Lands Clauses Act, 1845 (9 & 10 Vict. c. 18), s. 68.

(*m*) *Vide supra*, p. 231.

(*n*) *Caledonian Ry. Co. v. Coll*, (1860) 3 Macq. H. L. 833; *Imperial Gas Light and Coke Co. v. Broadbent*, (1859) 7 H. L. C. 600.

(*o*) *Hammersmith Ry. Co. v. Brand*, (1869) L. R. 4 H. L. 171.

(*p*) *Ricket v. Metropolitan Ry. Co.*, (1867) L. R. 2 H. L. 175; *Caledonian Ry. Co. v. Walker's Trustees*, (1882) 7 App. Cas. 259.

(*q*) *Birkenhead Corporation v. L. & N. W. Ry. Co.*, (1885) 15 Q. B. D. 572.

(*r*) *Geddis v. Proprietors of Bann Reservoir*, (1878) 3 App. Cas. 430; *Clothier v. Webster*, (1862) 12 C. B. N. S. 790; cf. *Lewis and Salome v. Charing Cross, etc. Ry. Co.*, [1906] 1 Ch. 508.

(*s*) Cf. *Bull v. Imperial Gas Co.*, (1866) 2 Ch. App. 158; *Hopkins v. G. N. Ry. Co.*, (1877) 2 Q. B. D. 224.

(*t*) Cf. *Fenwick v. East London Ry. Co.*, (1875) L. R. 20 Eq. 544.

(*u*) *In re London, T. & S. Ry. Co. and Gower's Walk Schools (Trustees)*, (1889) 24 Q. B. D. 326, at p. 332.

Thus, if, by the same act, ancient and modern lights are interfered with, compensation can be recovered in respect of both; but if only modern lights are obstructed, no compensation could be claimed (*v*).

If the general market value of the property has depreciated, the measure of depreciation will form the basis of compensation (*x*). Any exceptional value of a special kind attaching to the premises, by reason of a particular proprietorship, should be disregarded (*y*). Market value.

In order to claim compensation for injurious affection it is also necessary—as in the case where land is taken (*z*)—that the right, or interest, interfered with should refer to real property or its incidents, and should not merely be connected with purely personal interests or an interest in a chattel (*a*). Rights affected must appertain to real property.

But, although the interest in respect of which compensation is claimed must refer to real property, it is to be noted that the owner thereof may append to his claim items in respect of damage to chattels (*b*). Possible exceptions.

Special Acts may, however, of course, be so framed as to directly entitle claimants to compensation for personal losses (*c*).

Interference with an easement would give rise to a valid claim (*d*), as would also non-compliance with a restrictive covenant beneficial to other property (*e*). Easements.

If the right interfered with be of a public character and special damage could be proved, damages would be recoverable by action, but for the empowering statute. In such a case compensation may be claimed (*f*). Public rights.

Special enactments have been provided dealing with rights of common, rent-charges, etc. (*g*). Rent-charges, etc.

An owner of land, who claims compensation under s. 68 for injurious affection of his property, should not bring his claim for compensation until, through the construction of the works, the damage resulting therefrom is capable of assessment. All damage capable of being foreseen can then be claimed, but the assessment will be final and cannot be reopened (*h*). Finality of assessment.

(*v*) See note (*u*), p. 232, *ante*.

(*z*) *Wadham v. N. E. Ry. Co.*, (1884) 14 Q. B. D. 747; *Beckett v. Midland Ry. Co.*, (1867) L. R. 3 C. P. 82, at p. 95.

(*y*) *Wadham v. N. E. Ry. Co.*, *ubi supra*, per Mathew, J., at p. 752.

(*z*) *Vide supra*, pp. 228, 230.

(*a*) *Contrast R. v. Metropolitan Board of Works*, (1869) L. R. 4 Q. B. 358, with *Metropolitan Board of Works v. McCarthy*, (1874) L. R. 7 H. L. 243.

(*b*) *Knock v. Metropolitan Ry. Co.*, (1868) L. R. 4 C. P. 131.

(*c*) Cf. Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308.

(*d*) *Eagle v. Charing Cross Ry. Co.*, (1860) L. R. 2 C. P. 638.

(*e*) *Long Eaton R. G. Co. v. Midland Ry. Co.*, [1902] 2 K. B. 574.

(*f*) *Beckett v. Midland Ry. Co.*, (1867) L. R. 3 C. P. 82; cf. *Metropolitan Board of Works v. McCarthy*, *ubi supra*.

(*g*) Lands Clauses Act, 1845 (9 & 10 Vict. c. 18), ss. 99—107 and 115—118.

(*h*) *Stone v. Mayor, etc. of Yeovil*, (1876) 2 C. P. D. 99; *Macey v. Metropolitan Board of Works*, (1864) 33 L. J. Ch. 377; cf. *R. v. Poultter*, (1887) 20 Q. B. D. 132. *Vide supra*, pp. 230, 231.

Partial better-
ment im-
material.

If some land belonging to an owner has been injuriously affected, but other land belonging to him has been enhanced in value by the undertaking, the promoters of the undertaking cannot set off such enhanced value against the claim for compensation (i).

Compulsory Purchase of Mines.

Under the
Lands Clauses
Act, 1845,
"land"
includes
mines.

The word "land" in the Lands Clauses Act, 1845, includes mines, and apart from special statutory provisions, or special agreement, the owner of mines situate underneath land taken by the promoters of an undertaking can compel the promoters to take proceedings for the assessment and purchase of such mines (k).

Furthermore, the promoters can insist upon purchasing such underlying mines, at any time prior to the expiration of the time limited for the exercise of their compulsory powers (k).

Railways
Clauses Act,
1845.

Such powers of the promoters to compulsorily purchase underlying mines are not, even in the case of railway companies, taken away (l) by section 77 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), which enacts that "with respect to mines lying under or near the railway . . . the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Exemption
from obliga-
tions.

Section 77, set out above, is not for the benefit of the mine owner, but of the company, and its only effect is to exempt the railway company from the obligation of buying the minerals at once, together with the surface lands (l).

Working of
underlying
mines.

Section 78 of the Railways Clauses Act, 1845, enacts that if the owner, lessee, or occupier of underlying mines desires to work such mines, not taken over by the railway company, he shall give thirty days' notice of his intention, and if the railway company consider that the working of the mines would be prejudicial to the railway undertaking, they can purchase the mines by paying compensation in the usual way.

Special clauses or provisions relating to mines are to be found not only in the Railways Clauses Consolidation Act, 1845, but

(i) *Senior v. Metropolitan Ry. Co.*, (1863) 2 H. & C. 258; *Eagle v. Charing Cross Ry. Co.*, (1867) L. R. 2 C. P. 638. *Vide supra*, p. 231.

(k) *Errington v. Met. D. Ry. Co.*, (1882) 19 Ch. D. 559, *per* Jessel, M.R., at pp. 568, 569; cf. *Midland Ry. Co., etc. v. Robinson*, (1890) 15 App. Cas. 19, at p. 35.

(l) *Errington v. Met. D. Ry. Co.*, *ubi supra*. Cf. *L. & N. W. Ry. Co. v. Howley Park Coal Co.*, [1911] 2 Ch. 97.

also in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27, and numerous Canal Acts.

Such provisions are to be regarded, in cases where they apply, as being in substitution of the common law (*n*). If, however, a public body purchase land by a purely voluntary agreement, the common law rights will subsist between the parties (*n*).

The common law rule, apart from special enactments, is that where an owner sells land for the promotion of an undertaking, he impliedly sells all support, adjacent and subjacent, necessary for the purposes of the undertaking. Hence, he cannot mine in such a manner as to impair that support (*o*). In cases, therefore, where the owner has under a compulsory sale, not under the Railways Clauses Act, 1845, reserved to himself the minerals, the restrictions imposed upon his free working thereof, by being compelled to maintain the necessary support, should be duly compensated for (*o*), since no subsequent claim can be made (*p*).

Rights of support.

Where, however, a railway company purchases land under the Railways Clauses Act, 1845, the company, by virtue of section 77, will not necessarily acquire the underlying mines.

Under such statutory purchase of surface land the company, if it does not expressly purchase the underlying minerals, cannot claim the benefit of support which would accrue to an ordinary purchaser (*q*).

A purchaser from a railway company has no greater rights than his vendor from whom he derives his title, and the owner of underlying mines can, in such a case, work the minerals in the manner usual in the district, although such working cause depression of the surface (*r*).

A notice by the owner or lessee, under section 78 of the Railways Clauses Act, 1845, of an intention to work an underlying mine, is not valid unless a genuine *bonâ fide* intention exist (*s*).

Notice of intention to work underlying mines.

If a notice be given, and the promoters of the undertaking, who own the surface, issue a counter-notice requiring the owner not to work the mine, and stating their willingness to make compensation, this does not in itself constitute a transfer of the property in the minerals (*t*).

(*n*) *G. W. Ry. Co. v. Bennett*, (1866) L. R. 2 H. L. 27; *Holliday v. Mayor, etc. of Wakefield*, [1891] A. C. 81. Cf. *L. & N. W. Ry. Co. v. Howley Park Coal Co.*, [1911] 2 Ch. 97.

(*n*) *Manchester Corporation v. New Moss Colliery Co.*, [1908] A. C. 117.

(*o*) *Caledonian Ry. Co. v. Sprot*, (1856) 2 Macq. H. L. (Sc.) 449; *L. & N. W. Ry. Co. v. Evans*, [1893] 1 Ch. 16; cf. *In re Corporation of Dudley*, (1881) 8 Q. B. D. 86.

(*p*) *G. W. Ry. Co. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157.

(*q*) *G. W. Ry. Co. v. Bennett*, (1866) L. R. 2 H. L. 27; cf. *Re Gerard (Lord) and L. & N. W. Ry. Co.*, [1895] 1 Q. B. 459.

(*r*) *Pountney v. Clayton*, (1883) 11 Q. B. D. 820.

(*s*) *Midland Ry. Co. v. Robinson*, (1890) 15 App. Cas. 19, at p. 32.

(*t*) *G. N. Ry. Co. v. Inland Revenue Commissioners*, [1901] 1 K. B. 416.

Measure of Compensation.

The measure of compensation is not the value of the coal, or other mineral, at the date of the counter-notice, but the amount which the owner would have made out of it during the time it would have taken him to get it, had he not been prohibited by the issue of the counter-notice (*x*).

If, therefore, the mineral rises in value after the date of the notice, the owner can recover compensation in respect of such enhanced value (*x*).

In the case of a mine subject to a lease, the compensation payable by the promoters of an undertaking under section 78 of the Railways Clauses Act, 1845, is the full value of the minerals left unworked, less the cost of working them.

The promoters are not entitled to deduct from the amount payable to the lessee any sum on the ground that there are other portions of the mine untaken, which the lessee could continue to work.

Accordingly the lessee is entitled to all the profit he would have made. The lessor is entitled to the rent or royalties which he would have received in respect of the reserved mineral, and not to the difference in value of the reversion before and after notice given (*y*).

Severance of
surface land.

A railway company, purchasing land for the construction of a railway, must pay, from time to time, to the owner or lessee of any mines extending so as to lie on both sides of the railway, all such additional losses and expenses as shall be incurred by reason of severance of surface land or interruption of or restriction upon the continuous working of the mine (*z*).

Under this provision, compensation must be made in respect of all additional losses and expenses incurred—even in respect of losses which are only imminent—provided they can be estimated with some degree of certainty (*a*).

Prospective
apprehended
loss.

Compensation under the mines and minerals sections of the Railways Clauses Act, 1845 (*b*), and of the Waterworks Clauses Act, 1847 (*c*), cannot be claimed in respect of merely apprehended or prospective damage.

Losses must be claimed for as and when they arise.

(*x*) *Bwlfa and Merthyr Dare Collieries, Ltd. v. Pontypridd Waterworks Co.*, [1903] A. C. 426.

(*y*) *Eden v. N. E. Ry. Co.*, [1907] A. C. 400; [1906] 1 K. B. 195; cf. *Rugby Portland Cement Co. v. L. & N. W. Ry. Co.*, [1908] 2 K. B. 606.

(*z*) Railways Clauses Act, 1845, ss. 80, 81.

(*a*) Cf. *Whitehouse v. Wolverhampton and Walsall Ry. Co.*, (1869) L. R. 5 Exch. 6; *Midland Ry. Co. v. Miles*, (1885) 30 Ch. D. 634.

(*b*) *In re Gerard (Lord) and L. & N. W. Ry. Co.*, [1895] 1 Q. B. 459; cf. *Whitehouse v. Wolverhampton and Walsall Ry. Co.*, *ubi supra*.

(*c*) *Holliday v. Mayor, etc. of Wakefield*, [1891] A. C. 81.

Incidental Provisions.

The ordinary rules as to payment of interest apply when land is purchased under statutory powers. Interest.

If a particular date is fixed for the completion of the purchase, interest at 4 per cent. will be payable from such date upon the purchase-money, in accordance with the ordinary practice which governs the liability of a purchaser to a vendor (*d*).

If no date be fixed, interest will be payable from the date when the vendors show a good title and offer possession (*e*).

If the purchasers have entered into possession of the land under section 85 of the Lands Clauses Act, 1845, interest is payable at the rate of 5 per cent. from the date of entry, until the purchase-money or compensation be paid.

The vendor must account to the purchaser for all rents or profits accruing subsequently to the date when interest becomes payable (*f*). Purchaser entitled to rents, etc.

In the case, however, where compensation is claimed owing to the owner of minerals being prevented from working such minerals by reason of a notice issued upon him under section 78 of the Railways Clauses Act, 1845, the arbitrator cannot award any interest for the period between the date of the notice and the date of his award (*g*).

Where land is taken under the Lands Clauses Act, 1845, from persons having limited interests, or from persons under any disability or incapacity, the purchase-money or compensation must be deposited in the Bank of England, for the benefit of such persons, in the manner provided in the Act (*h*). For this purpose, the same provisions apply whether the compensation be payable for land taken or merely for land injuriously affected. Persons under disability.

The money is under the control of the Chancery Division (*i*).

The purchase-money for lands paid into court under sections 69 and 71 of the Lands Clauses Act, 1845, does not lose the character of realty (*k*).

Sections 10 and 11 of the Lands Clauses Act, 1845, authorise the sale of lands in consideration of an annual rent-charge, and make such rents a charge on the tolls or rates, if any, payable under the special Act. Payment by rent-charge.

The operation of these provisions has been extended to include persons, as owners, who are under disability.

(*d*) *Fletcher v. L. & Y. Ry. Co.*, [1902] 1 Ch. 901.

(*e*) *In re Pigott and G. W. Ry. Co.*, (1881) 18 Ch. D. 146.

(*f*) *Regent's Canal Co. v. Ware*, (1857) 23 Beav. 575.

(*g*) *In re Richard and G. W. Ry. Co.*, [1905] 1 K. B. 68; cf. *Caledonian Ry. Co. v. Carmichael*, (1870) L. R. 2 H. L. (Sc.) 56; *Fletcher v. L. & Y. Ry. Co.*, [1902] 1 Ch. 901.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 9 and ss. 69—80.

(*i*) S. C. Fund Rules, 1894, r. 39.

(*k*) *Kelland v. Fulford*, (1877) 6 Ch. D. 491.

The rent-charge is to be applied for the same uses as the rents and profits of the land were applied (*l*).

Assignment of compensation.

Compensation under section 68 of the Lands Clauses Act, 1845, is a legal chose in action within the meaning of the Judicature Act, 1873, s. 25, and consequently an assignee can sue therefor in his own name (*m*).

Writ of execution cannot issue upon an award.

If compensation awarded be not duly paid, an action must be resorted to for its recovery (*n*). A writ of execution cannot be directly issued upon the award itself. But an action cannot be maintained in respect of compensation for land taken until a conveyance has been executed (*o*).

SECTION II.

Lord Campbell's Act, 1846.

Damages under Lord Campbell's Act, 1846.

The purport of the Fatal Accidents Act, otherwise known as Lord Campbell's Act, 1846 (9 & 10 Vict. c. 93), can be best understood by reciting the preamble to the Act. It runs as follows:

Preamble.

"Whereas no action at law is now maintainable (*p*) against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him."

Section 1.

Section 1 provides that where a person's death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action and recovered damages (*q*) in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have been caused under such circumstances as amount in law to a felony.

Action must be similar to that open to deceased—had he lived.

It is to be observed that the words in the above section "if he had lived, could have maintained an action" are to be read as meaning ". . . could have maintained a similar action" (*r*).

(*l*) Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4.

(*m*) *Dawson v. G. N. & City Ry. Co.*, [1905] 1 K. B. 260.

(*n*) *R. v. L. & N. W. Ry. Co.*, (1854) 3 E. & B. 443, *per* Coleridge, J., at p. 468.

(*o*) *Cf. Howell v. Met. D. Ry. Co.*, (1881) 19 Ch. D. 508, *per* Chitty, J., at p. 515.

(*p*) *Cf. Osborne v. Gillett*, (1873) L. R. 8 Ex. 88.

(*q*) The plaintiff cannot therefore succeed if the death of deceased was really due to deceased's negligence: *Waite v. N. E. Ry. Co.*, (1859) E. B. & E. 728; *Trucker v. Chaplin*, (1848) 2 C. & K. 730. Nor can the action be maintained if the cause of action, had it been brought by the deceased himself, would have been statute-barred: *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K. B. 804.

(*r*) *Cf. Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648, *per* Sir Gorell Barnes, at p. 662.

Thus, in a case of damage resulting from an act which amounts possibly both to negligence and to breach of warranty, but certainly to breach of warranty, the mere fact that the deceased could have brought an action for breach of warranty, had he lived, or that his executors could still bring such an action, does not—*ipso facto*—suffice to bring a claim for negligence under Lord Campbell's Act within the purview of the statute. The statute confines itself strictly to causes of action which do not survive the death of the deceased person (s).

Section 2 provides that an action under this Act shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

Section 2.
Parties by and for whom action is to be brought.

Section 5 provides that the word "child" shall be deemed to comprise son and daughter, grandson and granddaughter, and stepson and stepdaughter, and that the word "parent" shall include father and mother, grandfather and grandmother, stepfather and stepmother.

Section 5.
Definitions.

An illegitimate child is not (t), but an infant *en ventre sa mère* is, within the purview of the statute (u). A wife living in adultery apart from her husband is not entitled to the benefit of the statute (v).

Illegitimate child excluded.

Lord Campbell's Act is incorporated in the provisions of the Employers' Liability Act, 1880 (w). Persons, therefore, entitled to sue under Lord Campbell's Act, by reason of their kinship with the deceased, can, in appropriate circumstances, sue under the Employers' Liability Act (w).

Employers' Liability Act, 1880.

By 27 & 28 Vict. c. 95, where there is no executor or administrator, or if no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued.

When dependants may themselves sue.

Not more than one action shall lie for and in respect of the same subject-matter of complaint, and the action must be commenced within twelve months after the death of the deceased person (x).

Time within which action must be brought.

If, however, the defendants be a public authority, proceedings must be instituted within six months of the death of the

(s) Cf. *Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648, *per* Sir Gorell Barnes, at p. 662.

(t) *Dickinson v. N. E. Ry. Co.*, (1863) 2 H. & C. 735; cf. *Smith's Dock Co. v. John Readhead & Sons*, [1912] 2 K. B. 323. As to death of child after verdict, but before judgment signed, *vide Kramer v. Waymark*, (1866) L. R. 1 Ex. 241.

(u) *The George and Richard*, (1871) L. R. 3 Ad. & E. 466.

(v) *Stimpson v. Wood & Son*, (1888) 57 L. J. Q. B. 484.

(w) Cf. 43 & 44 Vict. c. 42, s. 1.

(x) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 3.

deceased—in accordance with the Public Authorities Protection Act, 1893, s. 1 (6) (*y*).

The Maritime Conventions Act, 1911 (*z*), s. 8, extends the time within which an action may be brought against a vessel or her owners under the Fatal Accidents Act, 1846, for damages for loss of life occasioned by the collision of that vessel with another, from one year, as specified in the latter Act, to two years (*a*).

If the deceased has brought and concluded an action in his lifetime or has received satisfaction during his life in respect of the injury, no fresh action, or no action at all, as the case may be, can be instituted after his death (*b*).

Additional
damage to
deceased's
estate.

It would appear, however, that an additional action is maintainable by the executors for "damage to the estate" or breach of contract, and that, if such an action lies, it is not barred by satisfaction recovered under the statute (*c*).

Allocation of
damages.

The damages recovered under Lord Campbell's Act, after deducting the costs not recovered from the defendant, are to be divided amongst the parties entitled, in such shares as the jury by their verdict shall apportion (*d*).

Where a sum of money was received by way of compromise of an action under Lord Campbell's Act, it was held that the court could distribute the money in the same manner as a jury might have done under the Act. In this particular case the executors brought an action in the Court of Chancery asking for a declaration as to the persons entitled to the money (*e*).

Measure of Damages.

The measure of damages recoverable under Lord Campbell's Act is the pecuniary loss resulting to the parties for whose benefit the action is brought, by reason of the death of the person injured.

Damages do
not include
"solatium."

The damages must not comprise any item as a solatium in respect of the mental sufferings occasioned by the death of the deceased (*f*).

The relations cannot claim compensation if the only pecuniary benefit to them arising from the life of the deceased was in

(*y*) *Markey v. Tolworth Joint Hospital District Board*, [1900] 2 K. B. 454, *per* Darling, J., at p. 458; *cf. Williams v. Mersey Docks and Harbour Board*, [1905] 1 K. B. 804.

(*z*) 1 & 2 Geo. 5, c. 57.

(*a*) *Cf. The Caliph* (1912), 28 T. L. R. 597.

(*b*) *Read v. G. E. Ry. Co.*, (1868) L. R. 3 Q. B. 555.

(*c*) *Bradshaw v. L. & Y. Ry. Co.*, (1875) L. R. 10 C. P. 189; *Potter v. Metropolitan Ry. Co.*, (1874) 32 L. T. 36; *Leggott v. G. N. Ry. Co.*, (1876) 1 Q. B. D. 599; *Daly v. Dublin, Wicklow and Wexford Ry. Co.*, (1892) 30 L. R. Ir. 514.

(*d*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2.

(*e*) *Bulmer v. Bulmer*, (1883) 25 Ch. D. 409.

(*f*) *Blake v. Midland Ry. Co.*, (1852) 18 Q. B. 93; *cf. Armsworth v. S. E. Ry. Co.*, (1847) 11 Jur. 758, *per* Parke, B., at p. 760.

respect of a contract entered into by him with them (*g*) Such form of support or expectation would not constitute dependency as contemplated by this Act.

On the other hand, it has been held that a mother might claim damages for the loss of an annuity which the deceased—her son, a professional man—had covenanted to pay during his and her joint lives (*h*). In this case it was held that the mother was entitled to be put in the same pecuniary position as if her son had not been killed, but that she was not entitled to such sum as would purchase, for a person of her age, an annuity of the same amount as that specified in the covenant, and for the following reasons:—(1) The son might have died in any case before his mother. (2) A covenant for an annuity entered into by a professional man is of less value than a Government annuity.

Loss of annuity.

It was also held that the mother's life should, in the absence of evidence to the contrary, be deemed to be likely to be one of average duration; but evidence of the mother's state of health would have been admissible.

A reasonable expectation of pecuniary benefit from the continuance of the life of the deceased may be made the subject of a claim under this Act, although no actual assistance has ever been extended by the deceased to the plaintiff (*i*).

Expectation of benefit.

It is for the jury in each case to decide whether or not a reasonable expectation of pecuniary benefit, such as can be estimated in money, existed (*k*).

If no pecuniary loss be proved the defendant is entitled to succeed (*l*).

The loss of the benefit of education or of the enjoyment of the comforts of life, depending upon the possession of pecuniary means, through the death of a parent whose income ceased with his death, may well form the basis of an action for damages under Lord Campbell's Act (*m*).

Forms of benefit.

Damages cannot be awarded in respect of funeral expenses or travelling expenses and mourning (*n*); nor for medical expenses

Funeral expenses, loss of service etc., not recoverable.

(*g*) *Sykes v. N. E. Ry. Co.*, (1875) 44 L. J. C. P. 191.

(*h*) *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Ex. 221.

(*i*) *Franklin v. S. E. Ry. Co.*, (1858) 3 H. & N. 211; *Duckworth v. Johnson*, (1859) 4 H. & N. 653; *Condon v. G. S. & W. Ry. Co.*, (1865) 16 Ir. C. L. R. 415; *Jenkins v. Taff Vale Ry. Co.*, (1912) 28 T. L. R. 340; affd. (H. L.) *Times* Newsp. 24 Oct., 1912; cf. *Holleran v. Bagnell*, (1880) 6 L. R. Ir. C. L. 333.

(*k*) *Franklin v. S. E. Ry. Co.*, (1858) 3 H. & N. 211; *Duckworth v. Johnson*, (1859) 4 H. & N. 653; *Condon v. G. S. & W. Ry. Co.*, (1865) 16 Ir. C. L. R. 415; cf. *Holleran v. Bagnell*, (1880) 6 L. R. Ir. C. L. 333.

(*l*) *Kerry v. England*, [1898] A. C. 742. As to degree of proof required, cf. *Hull v. G. N. Ry. Co.*, (1890) 26 L. R. Ir. C. L. 289.

(*m*) *Pym v. G. N. Ry. Co.*, (1863) 4 B. & S. 396; *Hetherington v. N. E. Ry. Co.*, (1882) 9 Q. B. D. 160.

(*n*) *Dalton v. S. E. Ry. Co.*, (1858) 4 C. B. N. S. 296; *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648.

incurred on behalf of the deceased (*o*); nor for the loss of service (*p*), though it is to be observed that damages for loss of service and medical and funeral expenses may be recoverable in an action based upon breach of contract (*q*)—not under Lord Campbell's Act.

Insurance to be disregarded.

By the Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7), s. 1, it is enacted that in assessing damages under Lord Campbell's Act there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of insurance.

The effect of this latter Act is to make the principle underlying the Railway Passengers Assurance Companies Act, 1864 (27 & 28 Vict. c. 125), s. 35, one of universal application, and to render nugatory a long line of previous decisions (*r*).

Foreigners.

The provisions of Lord Campbell's Act apply as well for the benefit of the representatives of a deceased foreigner as for those of a British subject—at all events as against a British wrong-doer (*s*).

Jurisdiction of Admiralty Court.

The Admiralty Court cannot merely by virtue of the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7, which gave it "jurisdiction over any claim for damage done by any ship," entertain an action "in rem" for damages for loss of life under Lord Campbell's Act (*t*).

Furthermore, where an action is brought in the King's Bench Division under Lord Campbell's Act against shipowners, the action will not be transferred to the Admiralty Division merely because the defendants have obtained a decree under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, limiting their liability (*u*).

But the Admiralty Court can entertain actions brought under Lord Campbell's Act (*x*), though they are not to be regarded as admiralty actions, and therefore the admiralty rule as to half damages does not apply to them (*x*).

Shipowners' Negligence Act, 1905.

The remedy given by action for fatal injuries is further enlarged in its scope by the Shipowners' Negligence Act, 1905 (5 Edw. 7, c. 10), s. 1. This Act provides that, in cases where it is alleged that the owners of any ship are liable to pay damages

(*o*) *Boulter v. Webster*, (1865) 11 L. T. 598; cf. *Pulling v. G. E. Ry. Co.*, (1882) 9 Q. B. D. 110.

(*p*) Cf. *Osborne v. Gillett*, (1873) L. R. 8 Ex. 88; *Clark v. London General Omnibus Co.*, *ubi supra*, at p. 662; cf. *Jackson v. Watson & Sons*, [1909] 2 K. B. 193.

(*q*) *Jackson v. Watson*, *ubi supra*; *Bradshaw v. L. & Y. Ry. Co.*, (1875) L. R. 10 C. P. 189.

(*r*) Cf. *Hicks v. Newport Ry. Co.*, (1857) 4 B. & S. 403, n.

(*s*) *The Explorer*, (1870) L. R. 3 Ad. & E. 289; *Davidsson v. Hill*, [1901] 2 K. B. 606; dissenting from *Adam v. British and Foreign SS. Co.*, [1898] 2 Q. B. 430.

(*t*) *The Vera Cruz*, (1884) 9 P. D. 96; 10 App. Cas. 59.

(*u*) *Roche v. L. & S. W. Ry. Co.*, [1899] 2 Q. B. 502; cf. *The Nereid*, (1887) 14 P. D. 78.

(*x*) *The Bernina*, (1887) 12 P. D. 58; (1888) 13 App. Cas. 1.

in respect of personal or fatal injuries caused in any port or harbour in the United Kingdom, by the ship, or on it, or by any of its crew, a judge of any court of record in England or Ireland may issue an order for the detention of such ship, if found within three miles of the English or Irish coast, until satisfaction or security be given. Detention of ship.

The judge must be satisfied that the owners are *probably* liable and that none of them are resident in the United Kingdom.

SECTION III.

Employers' Liability Act, 1880.

Damages under the Employers' Liability Act, 1880.

The operation of the Employers' Liability Act, 1880 (*y*), has been annually extended since 1887, the date when it would originally have expired.

It is therefore competent for any *employé* who comes within the scope of this Act to sue under it, instead of under the Workmen's Compensation Act, 1906. But, as is mentioned hereafter, the cause of action is much more restricted than in the case of a claim under the Workmen's Compensation Act (*z*), though the damages recoverable may be greater (*a*).

The workmen who come within the scope of this Act are only those who come within the definition "workman" contained in section 8 of the Act. Under the Workmen's Compensation Act, 1906, all classes of workmen are comprised except those expressly excluded (*b*). "Workman" as defined by the Employers' Liability Act, 1880, s. 8, means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. The latter Act applies to any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or person engaged in manual labour (not being a domestic or menial servant, or a seaman) (*c*). Who may sue.

The main purpose of the Employers' Liability Act, 1880, is to remove in certain cases the common law defence of "common employment." Purport of the act—limitation of defence of "common employment."

It is therefore enacted that the workman, or, in case of injury resulting in death, the legal representatives of the workman and any persons entitled in case of death (*d*), shall have the same right of compensation and remedies against the employer as if the

(*y*) 43 & 44 Vict. c. 42.

(*z*) *Vide infra*, p. 246.

(*a*) *Vide infra*, pp. 245, 246.

(*b*) Cf. Workmen's Compensation Act, 1906, s. 13.

(*c*) 38 & 39 Vict. c. 90, s. 10.

(*d*) Cf. Lord Campbell's Act, 1846 (9 & 10 Vict. c. 93), and also amending Act, 27 & 28 Vict. c. 95.

workman had not been a workman of, nor in the service of, the employer, in cases of personal injury caused to a workman—

(1) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer (*e*) ; which defect was caused or remained undiscovered or remedied owing to the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery or plant were in proper condition (*f*).

The above provision applies whether the defect arises from original fault of the works, etc., or from want of repair (*g*).

Or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence (*h*).

Or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed (*i*).

Or (4) by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf (*k*) ; where the injury results from some impropriety or defect in the rules, bye-laws, or instructions (*l*). But no bye-law is to be deemed defective which shall have been approved as proper by any department of Government under any Act of Parliament (*m*).

Or (5) By reason of the negligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine, or train upon a railway (*n*).

Provided that in each of the above cases the workman injured cannot recover if he knew of the defect or negligence and failed within a reasonable time to give or cause to be given information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence (*o*).

It will be observed that the Employers' Liability Act, 1880, expressly retains to the employer the defence of "*volenti non fit injuria*."

Defence of
"*volenti non
fit injuria*"
retained.

(*e*) E. L. Act, 1880, s. 1, sub-s. 1.

(*f*) E. L. Act, 1880, s. 2, sub-s. 1.

(*g*) *Heske v. Samuelson*, (1883) 12 Q. B. D. 30.

(*h*) E. L. Act, 1880, s. 1, sub-s. 2.

(*i*) E. L. Act, 1880, s. 1, sub-s. 3.

(*k*) E. L. Act, 1880, s. 1, sub-s. 4.

(*l*) E. L. Act, 1880, s. 2, sub-s. 2.

(*m*) E. L. Act, 1880, s. 2, sub-s. 2.

(*n*) E. L. Act, 1880, s. 1, sub-s. 5.

(*o*) E. L. Act, 1880, s. 2, sub-s. 3.

Measure of Damages.

The amount of compensation recoverable under the Employers' Liability Act shall not exceed such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury (*p*).

If the employer has been made to pay any penalty to the workman or his representatives in pursuance of any Act of Parliament (*q*) in respect of the same cause of action, such penalty must be deducted from the amount of compensation otherwise due (*r*). Penalty to be deducted.

Furthermore, if compensation be claimed under this Act, neither the workman nor his representatives shall thereafter be entitled to any penalty under any other Act of Parliament in respect of the same cause of action (*r*). Single remedy.

There is no basis prescribed by the Act for the assessment of damages, but it is submitted that the assessment should not start with the assumption that a loss of three years' earnings is the highest loss that can be sustained—thus treating that as the standard by which to estimate the loss in the particular case. It is submitted that the damages should be assessed independently of the limit, upon the same principles as would apply in an ordinary common law action for damages for personal injury—subject, however, of course, to the maximum not being exceeded (*s*). Basis of assessment.

The measure of damages recoverable by the workman's representatives in case of death is the pecuniary loss sustained by them. (Cf. Lord Campbell's Act, 9 & 10 Vict. c. 93.) (*Vide supra*, p. 240). Death of workman.

In one case, the widow of a workman obtained a sum under this Act calculated at ten shillings a week for seven years (*t*).

It will be observed that, under certain circumstances, it may be to the advantage of a workman or his representatives to sue under this Act instead of under the Workmen's Compensation Act, 1906.

Thus, under the Employers' Liability Act, three years' wages may be recovered; but under the Workmen's Compensation Act the limit in case of death is three years' wages, or 150*l.*, whichever sum is larger, but in no case more than 300*l.* Therefore the representatives of a deceased workman who earned more than 2*l.* Damages recoverable may exceed compensation under Workmen's Compensation Act, 1906.

(*p*) E. L. Act, 1880, s. 3.

(*q*) *E.g.*, Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 136.

(*r*) E. L. Act, 1880, s. 5.

(*s*) Cf. *Theobald v. Railway Passengers Assurance Co.*, (1854) 23 L. J. Ex. 249, per Alderson, B., at p. 254.

(*t*) *Owens v. Maudslay*, (1882) 72 L. T. Newspaper, 299.

a week might recover a larger amount under the Employers' Liability Act than under the Workmen's Compensation Act.

Further, under the Workmen's Compensation Act no direct damages can be awarded to an injured workman in respect of medical expenses or personal suffering. The whole basis of assessment is different.

On the other hand, the large majority of claims made under the Workmen's Compensation Act, 1906, could not be maintained under the Employers' Liability Act, since no cause of action would exist thereunder (x).

SECTION IV.

Workmen's Compensation Act, 1906.

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In an action for damages for injuries caused by accident brought by a workman against his employer at common law there are four defences open to the employer :

- (1) Common employment ;
- (2) *volenti non fit injuria* ;
- (3) contributory negligence ;
- (4) inevitable accident (y).

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), was framed with a view to depriving the employer of the defence of common employment in certain cases (z).

Purport of
the Act.

The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), abolishes entirely the defences of common employment and of *volenti non fit injuria* and of inevitable accident, and it also abolishes the defence of contributory negligence, except in cases where the workman has been guilty of serious and wilful misconduct and is not seriously and permanently disabled (a). In this section the assessment of compensation and the liabilities of the employer under the Workmen's Compensation Act are dealt with. Those portions of the Act relevant to this aspect of the subject are set out or referred to.

(x) *Vide infra*, p. 246.

(y) Cf. *River Wear Commissioners v. Adamson*, (1877) L. R. 2 App. Cas. 743.

(z) *Vide supra*, p. 243.

(a) *Vide infra*, p. 261.

Accident resulting in Death of Workman.

Under the Workmen's Compensation Act, 1906(*b*), where the death of a workman(*c*) results from injury received in an accident arising out of and in the course of the workman's employment, the amount of compensation payable may have to be determined under three different sets of circumstances

- (1) When there are dependants wholly dependent;
- (2) when there are dependants in part dependent;
- (3) when there are no dependants.

"Dependants" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity due to the accident, have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively. Definitions.

"Member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister(*d*).

It may be noted that an illegitimate bachelor can have no dependant other than a parent or grandparent, or an illegitimate child or grandchild(*e*).

Whether an applicant is or is not a dependant would seem—in default of agreement(*f*)—to be a question of fact for the judge to determine, irrespective of the standard of life of the applicant(*g*). Dependency a question of fact.

Dependants must be dependent at the time of the workman's death, though a child *en ventre sa mère* may be a dependant(*h*).

Even in the case of a child(*i*), or a wife(*k*), there is no presumption of law in favour of dependency upon the parent(*i*) or husband(*k*). The question is purely one of fact(*k*).

(*b*) 6 Edw. 7, c. 58.

(*c*) For definition of workman, *vide* W. C. Act, 1906, s. 13. The onus of proof that relationship of employer and workman existed rests upon the applicant: cf. *Hoare v. Barge "Cecil Rhodes" (Owners of)*, (1911) 5 B. W. C. C. 49, at p. 50; as does also the onus of proof that an "accident" has been sustained: cf. *Ashley v. Lilleshall & Co.*, (1911) 5 B. W. C. C. 85.

(*d*) W. C. Act, 1906, s. 13.

(*e*) Cf. *McLean and Wife v. Moss Bay Iron and Steel Co., Ltd.*, [1909] 2 K. B. 521; 2 B. W. C. C. 282; overruled on another point, [1910] A. C. 229.

(*f*) W. C. Act, 1906, Schedule 1 (*8*).

(*g*) Cf. *The Main Colliery Co. v. Davies*, [1900] A. C. 358, at p. 362; 2 W. C. C. 108; *Tamworth Colliery Co. v. Hall*, [1911] A. C. 665; 4 B. W. C. C. 313. As to power of arbitrator to decide question of paternity of illegitimate child, cf. *Johnstone v. James Spencer & Co.*, (1908) 45 S. L. R. 802; 1 B. W. C. C. 302.

(*h*) *Schofield v. Orrell Colliery Co.*, [1909] 1 K. B. 178; [1909] A. C. 433.

(*i*) *Lee v. S.S. Bessie (Owners of)*, (1911) 5 B. W. C. C. 55.

(*k*) *New Monckton Collieries, Ltd. v. Keeling*, [1911] A. C. 648.

Services
rendered by
deceased.

It would appear that in considering the question of dependency the pecuniary value of services rendered by the deceased to the alleged dependant may be taken into account, as against the deceased's cost of maintenance (*l*), but such services do not in themselves constitute contribution towards maintenance of the dependant (*l*).

Where there are both total and partial dependants compensation can be allotted partly to the total and partly to the partial dependants (*m*).

Dependants wholly dependent.

Amount of
compensa-
tion.

(I.) Where the workman has been in the employment of the same employer during the three years preceding the injury.

In this case the amount of compensation payable is a sum equal to the workman's earnings during the three years preceding the injury, or 150*l.*, whichever sum is the larger, but in no case must it exceed 300*l.* (*n*).

(II.) Where the workman has not been in the employment of the same employer during the three years preceding the injury.

In this case the amount of compensation is a sum equal to 156 times his average weekly earnings during the period of his actual employment by the same employer, or 150*l.*, whichever sum is the larger (*o*).

Computation of average weekly earnings.

To calculate the average weekly earnings it would appear that the following formula should be employed (*p*):

$$\frac{\text{Total earnings}}{\text{Number of weeks actually worked.}} \times \frac{\text{Number of workable weeks}}{52.}$$

"Where by reason of the shortness of time during which the workman has been in the employment of his employer . . . it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district" (*q*).

(*l*) Cf. *Tamworth Colliery Co. v. Hall*, [1911] A. C. 665.

(*m*) W. C. Act, 1906, Schedule I. (8).

(*n*) *Vide* W. C. Act, 1906, Schedule I. (1) (a).

(*o*) W. C. Act, 1906, Schedule I. (1) (a).

(*p*) Cf. *Bailey v. Kenworthy*, [1908] 1 K. B. 441, *per* Fletcher Moulton, L.J., at p. 461; 1 B. W. C. C. 351; *Anslow v. Cannock Chase Colliery Co., Ltd.*, [1909] A. C. 435; 2 B. W. C. C. 365.

(*q*) W. C. Act, 1906, Schedule I. (2) (a).

"Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident" (r).

"Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause" (s).

The computation of weekly earnings is a question of fact (t). If the workman has been working for the same employer at different kinds of work and his wages have varied according to the particular employment at a given time, the average of the different wages may be taken (u). But, in proper cases, regard may be had to those weeks during which the workman has not earned full wages owing to slackness of trade (x).

"Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid him shall not be reckoned as part of the earnings" (y).

"Earnings" may include incidental advantages, provided their value can be estimated in money, *e.g.*, lodgings provided by the employer.

"Tips" or gratuities of a legitimate and customary character may be included in earnings, although they are not given by the employer (z).

"Contingent" wages or "extras" may also be included, and incidental profits (a).

Furthermore, the "earnings" may even comprise a "retainer" paid by a third party, as being earnings under a concurrent contract of service (b).

Deductions.—"The amount of any weekly payments made Deductions.

(r) W. C. Act, 1906, Schedule I. (2) (b).

(s) W. C. Act, 1906, Schedule I. (2) (c); cf. *Perry v. Wright*, [1908] 1 K. B. 441; *Jury v. Owners of S.S. Atlanta* (1912), 28 T. L. R. 562.

(t) *Dobson v. British Oil and Cake Mills, Ltd.*, (1912) 5 B. W. C. C. 405; cf. *Hains and Strange v. Corbet*, (1912) 5 B. W. C. C. 372, at p. 375; *Perry v. Wright*, *ubi supra*.

(u) *Dobson v. British Oil and Cake Mills, Ltd.*, *ubi supra*; *Edge v. Gorton*, (1912) 28 T. L. R. 566.

(x) *White v. Wiseman*, (1912) 28 L. T. R. 542; *Anslow v. Cannock Chase Colliery Co.*, [1909] A. C. 435.

(y) W. C. Act, 1906, Schedule I. (2) (d).

(z) *Penn v. Spiers and Pond, Ltd.*, [1908] 1 K. B. 766; 1 B. W. C. C. 401; *Knott v. Tingle, Jacobs & Co.*, (1910) 4 B. W. C. C. 55.

(a) *Skales v. Blue Anchor Line, Ltd.*, [1911] 1 K. B. 360; 4 B. W. C. C. 16.

(b) *S.S. Raphael (Owners of) v. Brandy*, [1911] A. C. 413; 4 B. W. C. C. 307.

under this Act, and any lump sum paid in redemption thereof, shall be deducted from the amount payable as compensation" (c).

It is to be observed that, since the weekly payments to be deducted must have been "payments made under this Act," weekly payments made under an unrecorded agreement cannot be deducted. Similarly, it is very doubtful whether any lump sum paid in redemption can be deducted, unless the sum were paid under an agreement which had been duly registered (d).

Dependants in part dependent.

Amount of
compensa-
tion.

The amount payable to dependants who were only in part dependent upon the deceased workman is a sum, not exceeding the amount payable in cases of total dependency, "reasonable and proportionate to the injury to the said dependants" (e). It may be settled by agreement or arbitration.

Thus, even in a case of only partial dependency, the maximum amount recoverable under the Act may, under appropriate circumstances, be awarded.

An instructive case as to the manner in which the judge may direct himself in determining the amount payable is *Osmond v. Campbell and Harrison, Ltd.*, [1905] 2 K. B. 852, but it must be read in conjunction with the later case, *Tamworth Colliery Co., Ltd. v. Hall*, [1911] A. C. 665.

Funeral
expenses.

Subject to the maximum limit, funeral expenses may be included in computing what amount is "reasonable and proportionate" to the injury to those who are partially dependent (f).

Illegitimate
children.

The amount payable to an illegitimate child would seem to be affected to some extent by the question as to whether the father made voluntary contribution to his child's support or only contributed under compulsion of a bastardy order (g).

Dependants
may be
dependent
upon several
persons.

It has now been finally decided that a widow or any other dependant may be partially dependent upon several members of the same family who contribute to the common fund of the household. Accordingly, one set of dependants may recover compensation in respect of the deaths of several members of the same family, and may even recover the full amount in respect of each, provided the total sum is merely proportionate to the loss sustained by the deaths (h).

Distribution
of compensa-

"The payment in the case of death shall, unless otherwise

(c) W. C. Act, 1906, Schedule I. (1) (a).

(d) Cf. W. C. Act, 1906, Schedule II. (10); cf., however, *Williams v. Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 433; 9 W. C. C. 120.

(e) *Vide* W. C. Act, 1906, Schedule I. (1) (a) (ii.).

(f) Cf. *Gourlay v. Murray*, (1908) 45 S. L. R. 577; 1 B. W. C. C. 335.

(g) *Gourlay v. Murray*, *ubi supra*; cf. *Schofield v. Orrell Colliery Co., Ltd.*, [1909] 1 K. B. 178; 2 B. W. C. C. 301; [1909] A. C. 433.

(h) Cf. *Hodgson v. West Stanley Colliery*, [1910] A. C. 229, at pp. 233 and 234; 3 B. W. C. C. 260.

ordered (i), be paid into the county court, and any sum so paid into court shall, subject to rules of court and the provisions of Schedule I., be invested (k), applied, or otherwise dealt with by the court, in such a manner as the court thinks fit for the benefit of the persons entitled thereto, and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in" (l).

tion by the Court.

For the details of procedure upon payment into court *vide* rules 56a and 56b, Workmen's Compensation Rules, 1907.

"Where, on application being made . . . it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order of the court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the court may make such order for the variation of the former order or award as in the circumstances of the case the court may think just" (m).

Variation of award.

It is to be noted that death of one of the dependants is a sufficient "variation of circumstances" to justify the variation of an award (n).

No Dependants.

If there are no dependants the amount of compensation payable is the reasonable expenses of medical attendance and burial—not exceeding 10*l.* (o).

Amount of compensation.

The amount, if so agreed, is to be paid to the deceased's legal representative or to the persons who incurred the expense of medical attendance and burial. In default of agreement it is to be paid into court (p).

Compensation for Injury not resulting in Death.

In cases "where total or partial incapacity for work results from the injury, a weekly payment" is to be made to the workman "during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound:

Amount of compensation.

(i) Cf. W. C. Act, 1906, Schedule II. (16).

(k) As to investments, *vide* Schedule I. (10)—(13).

(l) W. C. Act, 1906, Schedule I. (5).

(m) W. C. Act, 1906, Schedule I. (9).

(n) *Ivey v. Ivey*, [1912] 2 K. B. 118; 5 B. W. C. C. 118.

(o) W. C. Act, 1906, Schedule I. (1) (a) (iii.).

(p) W. C. Act, 1906, Schedule I. (5).

“Provided that—

“(a) if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week; and

“(b) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings” (q).

“Average weekly earnings” are to be computed in the same manner as in cases of compensation awarded in which death has resulted (r).

Weekly
payment.

The compensation in cases of total or partial incapacity is, thus, a weekly payment. It cannot be redeemed by the payment of a lump sum until it has been continued for six months (s), except by agreement (s).

But it is to be observed that the Rule Committee have framed a rule—(Rule 18 (9)), May, 1909—providing that, where an employer admits liability, he may at any time before the time fixed for proceeding with the arbitration, instead of filing a notice submitting to an award for a weekly payment, file a notice that he submits to an award for a lump sum, to be specified in the notice, which he considers to be sufficient to cover his liability, and may thereupon pay the same into court.

Since, however, the Act nowhere provides that a lump sum may be awarded in respect of incapacity—save by way of redemption—it is submitted that this rule is so contrary to the general provisions of the Act as to be *ultra vires* (t).

Onus of proof
as to incapacity
arising
from accident.

Questions naturally arise, with much frequency, as to whether the total or partial incapacity does really result from the injury sustained, and, if so, whether the workman has disintitiled himself from compensation by not obtaining or submitting himself to proper medical treatment. If it be proved that the workman has met with an accident causing an injury, the onus of proof that a consequent disability arose from the workman's own conduct rests, of course, upon the employer (u).

In such cases, the question at issue is one of fact to be determined by the arbitrator. The workman must act reasonably (x).

(q) W. C. Act, 1906, Schedule I. (1) (b).

(r) *Vide supra*, p. 248; W. C. Act, 1906, Schedule I. (2).

(s) W. C. Act, 1906, Schedule I. (17). As to redemption, *vide infra*, p. 257.

(t) Cf. *Baird v. Dempster*, (1909) S. C. 127; 2 B. W. C. C. 144; *vide The Workmen's Compensation Act, 1906*, by Adshead Elliott (6th ed.), at p. 518.

(u) *Marshall v. Orient Steam Navigation Co.*, [1910] 1 K. B. 79; 3 B. W. C. C. 15.

(x) *Tutton v. Owners of S.S. Majestic*, [1909] 2 K. B. 54; 2 B. W. C. C. 346, *per* Cozens-Hardy, M.R., at p. 349; cf., however, *Marshall v. Orient Steam Navigation Co.*, *ubi supra*.

But where a workman's disability may be due either to an accident he has received or to a previous natural tendency to disease, the onus rests upon him of proving an inference that the disability arises from his accident (*y*).

"The employer shall not be liable in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed" (*z*).

Workman must be disabled for at least one week.

It may be observed that the arbitrator is given full discretion to award within the above prescribed limits any sum as a weekly payment he may choose, and quantum is really a matter for him to decide, and not the Court of Appeal (*a*). Thus, on the one hand, he can give less than the full amount in a case of total incapacity, or, on the other hand, he may give the full amount in a case of only partial incapacity, subject, however to his observing the following important rule:—

Discretion of arbitrator.

"In fixing the amount of the weekly payment, regard shall be had to any payment (*b*), allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable (*c*) employment, or business, after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper" (*d*).

Relevant factors.

In deciding upon the weekly sum to award in cases of partial incapacity, the arbitrator may take into consideration fluctuations in the general rate of wages of the class of workmen to which the applicant belongs (*e*), and he may legitimately take into consideration either a general reduction or increase in wages since the date of the accident (*f*). The principles upon which an award of weekly payments is to be made are further dealt with in connection with the subject of review of compensation. (*Vide infra*, pp. 254—257.)

(*y*) Cf. *Jones v. New Brynmally Colliery Co.*, (1912) 5 B. W. C. C. 375, *per* Cozens-Hardy M.R., at pp. 377 and 378.

(*z*) W. C. Act, 1906, s. 1 (2) (*a*).

(*a*) *Cory Bros. v. Hughes*, (1911) 27 T. L. R. 498, *per* Cozens-Hardy M.R., at p. 498; cf. *Hains and Strange v. Corbet*, (1912) 5 B. W. C. C. 372, at p. 375.

(*b*) Cf. *Doyle v. Cork Steam Packet Co.*, (1912) 5 B. W. C. C. 350. This does not include a payment under the Merchant Shipping Acts, 1894 and 1906: cf. *McDermott v. S.S. Tintoretto*, [1911] A. C. 35; 4 B. W. C. C. 123.

(*c*) As to the meaning of "suitable," *vide Eyre v. Houghton Main Colliery Co., Ltd.*, [1910] 1 K. B. 695; 3 B. W. C. C. 250.

(*d*) W. C. Act, 1906, Schedule I. (3).

(*e*) *Merry and Cunninghame, Ltd. v. Black*, (1909) 2 B. W. C. C. 372; 46 S. L. R. 812.

(*f*) *Bevan v. Energlyn Colliery Co.*, [1912] 1 K. B. 63; cf., however, *James v. Ocean Coal Co., Ltd.*, [1904] 2 K. B. 213; 6 W. C. C. 128.

Persons under legal disability.

“Where a weekly payment is payable under this Act to any person under any legal disability a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of Schedule I. with respect to sums required by that schedule to be paid into court shall apply to sums paid into court in pursuance of any such order” (g).

The above provision is framed with a view to preventing the misapplication of compensation payable to a person under age or under any other form of legal disability.

Nominal allowance.

The question as to the power of an arbitrator to award a purely nominal weekly allowance in cases where the workman is taken back at an undiminished wage is dealt with later in considering the subject of review of compensation (h).

Form of award.

Under form 24 in the Workmen's Compensation Rules, 1907, —the ordinary form used—the arbitrator may direct “weekly payments to continue during the total or partial incapacity of the workman, or until the same shall be ended, diminished, increased or redeemed.” This form has been held to be “*intra vires*,” although it does not distinguish between total and partial incapacity (i).

Examination by doctor.

Special provisions have been enacted with regard to a workman, who has claimed or is in receipt of compensation, being compelled to submit himself to examination by a doctor provided by the employer, under penalty of his rights to compensation being suspended (k).

Review of Weekly Payment.

“Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act” (l).

There is often a matter of dispute as to the extent to which an award may be regarded as *res judicata*.

Change of circumstances necessary.

A review of a weekly payment cannot be claimed unless fresh circumstances have arisen since the previous award (m), but, on the other hand, a workman's capacity for work may vary from time to time, and can therefore be repeatedly reviewed (n).

Issue to be decided.

The issue upon an application to review an award, having

(g) W. C. Act, 1906, Schedule I. (7).

(h) *Vide infra*, pp. 255, 256.

(i) *Higgins v. Poulson*, [1912] 2 K. B. 292; 5 B. W. C. C. 340.

(k) W. C. Act, 1906, Schedule I. (4), (14), (15).

(l) W. C. Act, 1906, Schedule I. (16).

(m) *Crossfield & Sons, Ltd. v. Tanian*, [1900] 2 Q. B. 629; 2 W. C. C. 141.

(n) *Sharman v. Holliday and Greenwood, Ltd.*, [1904] 1 K. B. 235; 6 W. C. C. 147; *Radcliffe v. Pacific S. N. Co.*, [1910] 1 K. B. 685; 3 B. W. C. C. 185.

regard to the amount which an injured workman "is earning or is able to earn in some suitable employment," is really the same as if it were an original award made at the date of the application to review (o). The arbitrator is therefore entitled—not to say bound—to make an award upon the consideration of the same factors which he would take into account in the case of an original award (p).

It is not a conclusive reason for the reduction of a weekly payment that a workman has so far recovered from the effects of his accident as to be physically capable of performing some kind of work. Relevant factors.

While it is true that the employer cannot be held responsible for the state of the labour market (q), nevertheless, if the workman's opportunities of finding employment have been restricted by his accident, the arbitrator may well take such fact into consideration (r).

The onus of proof in an application for review rests upon the party which applies (s), and where an employer applies for termination of compensation he does not discharge the onus cast upon him by merely proving that the workman is doing light work for him at the old rate of wages (t). Onus of proof.

If an injured workman has returned to work and is in receipt of the same or more wages than he received prior to his accident, but there exists some doubt as to whether the workman is genuinely earning his wages, or as to whether he has in fact completely recovered from the effects of his accident, the arbitrator may reduce the weekly payment to a nominal sum, e.g., 1*d.* per week. Nominal allowance.

By this procedure the claim of the workman is preserved intact, and at any future date application for review under the Workmen's Compensation Act, 1906, Schedule I. (16), may be made. Or the workman's claim may be preserved by the arbitrator making a declaration of the employer's liability to the effect that weekly payment shall be ended until further order, and registering it in the county court. Declaration of liability.

(o) Cf. *Radcliffe v. Pacific S. N. Co.*, [1910] 1 K. B. 685, 3 B. W. C. C. 185.

(p) *Vide* W. C. Act, 1906, Schedule I. (3). *Vide supra*, pp. 252—254; cf. *Bryson v. J. Dunn and Stephen, Ltd.*, (1906) 43 S. L. R. 236; 8 F. 226.

(q) *Dobby v. Wilsons, Pease & Co.*, (1909) 2 B. W. C. C. 370; *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009; *Guest, Keen and Nettlefolds v. Winsper*, (1911) 4 B. W. C. C. 289; cf. *Macdonald or Duris v. Wilson's and Clyde Coal Co.*, (1912) 5 B. W. C. C. 458; 28 T. L. R. 431.

(r) *Clark v. Gas Light and Coke Co.*, (1905) 21 T. L. R. 184; 7 W. C. C. 119; *Thomas v. Fairbairne, Lawson & Co.*, (1911) 4 B. W. C. C. 195; cf. *Bryce & Co. v. Connor*, (1905) 42 S. L. R. 154; 7 F. 193; *Proctor & Sons v. Robinson*, [1911] 1 K. B. 1004; (1909) 3 B. W. C. C. 41; *Ball v. Hunt & Sons*, (1912) 28 T. L. R. 428; 5 B. W. C. C. 459.

(s) *Proctor & Sons v. Robinson*, *ubi supra*; cf., however, *Anglo-Australian Steam Navigation Co. v. Richards*, (1911) 4 B. W. C. C. 247.

(t) *Cory Bros. v. Hughes*, (1911) 27 T. L. R. 498; and also (1911) 2 K. B. 738; 4 B. W. C. C. 291.

These two methods of granting a latent or suspensory award have been specifically approved by the Court of Appeal (*u*) and House of Lords (*x*).

In Scotland, however, this practice has been discountenanced (*y*).

Termination
of award.

If, however, the arbitrator is completely satisfied that the workman's earning capacity is in no way diminished or jeopardised by the accident, it is his duty to finally terminate the award—under which circumstances no review is possible (*z*).

But, unless there is evidence that the workman's earning capacity is not diminished or jeopardised, he is at least entitled to a declaration of liability (*a*).

Prospective
award illegal.

Upon an application to review weekly payments an arbitrator has no power to make a prospective award terminating or reducing the compensation at a given future date (*b*), or to make an award on a sliding scale (*c*).

Ante-dating
of award.

Where an application to reduce the amount of weekly payments as from an antecedent date is granted, the employer cannot deduct from future payments the excess already paid (*d*). He may, however, apparently recover such excess by a separate action (*d*).

Upon a simple application for a review and termination of a weekly payment, it is not competent to the arbitrator to make an award terminating the payment from a date antecedent to the application to review (*e*). But apparently, where the application to review asks in express terms for termination from a definite antecedent date, the arbitrator may terminate or reduce the payment retrospectively from that date (*e*).

Award and
recorded
agreement of
equal effect.

It is to be observed that, whether the workman is receiving compensation under an award or under a recorded agreement, express power is given to either party under the Act to apply for a review or termination of the award of weekly payment (*f*).

An agreement, when recorded, has the same operation and effect, for all material purposes, as an award made in the same terms (*f*).

(*u*) *Owners of the Vessel Tynron v. Morgan*, [1909] 2 K. B. 66; 2 B. W. C. C. 406.

(*x*) *Taylor v. L. & N. W. Ry. Co.*, [1912] A. C. 242; 5 B. W. C. C. 218.

(*y*) *Singer Manufacturing Co. v. Clelland*, (1905) 42 S. L. R. 757; 7 F. 975.

(*z*) *Nicholson v. Piper*, [1907] A. C. 215; 9 W. C. C. 123; cf. *Husband v. P. & P. Campbell*, (1903) 40 S. L. R. 822; 5 F. 1146; *Hargreave v. Haughhead Coal Co.*, [1912] A. C. 319; 5 B. W. C. C. 455.

(*a*) *Braithwaite and Kirk v. Cox*, (1911) 5 B. W. C. C. 77; cf., however, *Emmerson v. Donkin*, (1910) 4 B. W. C. C. 74.

(*b*) *Baker v. Jewell*, [1910] 2 K. B. 673; 3 B. W. C. C. 503.

(*c*) *Newhouse & Co. v. Johnson*, (1911) 5 B. W. C. C. 137; cf. *Higgins v. Poulson*, [1912] 2 K. B. 292.

(*d*) *Hosegood & Sons v. Wilson*, [1911] 1 K. B. 30; 4 B. W. C. C. 30; cf. *Doyle v. Steam Packet Co.*, (1912) 5 B. W. C. C. 350.

(*e*) *Charing Cross, Euston and Hampstead Ry. Co. v. Boots*, [1909] 2 K. B. 640; 2 B. W. C. C. 385. *Vide Hosegood & Sons v. Wilson*, *ubi supra*.

(*f*) *Cory Bros. v. Hughes*, [1911] 2 K. B. 738, *per* Cozens-Hardy M.R., at p. 743; cf. *Taylor v. L. & N. W. Ry. Co.*, [1912] A. C. 242.

Review of Compensation awarded to an Infant.

Where a workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound (*g*).

This provision, of course, only applies to cases of accidents which have occurred since July 1, 1907 (*h*).

The "probable earnings" are not restricted to what the workman would probably have been earning in his actual employment under the same employer, but are left to the discretion of the county court judge to determine upon the evidence before him (*i*).

Redemption.

"Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum" (*k*).

To decide whether redemption is to be calculated under the first or second proviso, it must be first decided, as a fact, whether or not the capacity is permanent (*l*).

It is to be observed that, although agreements may be made for the redemption of weekly payments by a lump sum, such agreements will not exempt the employer from liability unless the agreement be registered (*m*), or unless a satisfactory reason for non-registration be forthcoming (*n*). But it is also to be

(*g*) W. C. Act, 1906, Schedule I. (16).

(*h*) W. C. Act, 1906, s. 16 (1).

(*i*) *Vickers, Sons and Maxim, Ltd. v. Evans*, [1910] A. C. 444; 3 B. W. C. C. 126, 403.

(*k*) W. C. Act, 1906, Schedule I. (17).

(*l*) *Calico Printers' Association v. Higham*, [1912] 1 K. B. 93; (1911) 5 B. W. C. C. 97.

(*m*) W. C. Act, 1906, Schedule II. (10).

Preliminary question to be decided.

Registration of agreements.

observed that, if no claim for compensation be made under the Act, and no weekly payments be made thereunder, an agreement by an adult workman to accept a lump sum settlement need not be registered, and is apparently quite valid (*n*).

The registrar can, of course, refuse to register an agreement if he considers the agreed sum to be inadequate.

If a lump sum be agreed upon without arbitration, the amount may be directly paid to the person entitled—except in the case of a minor.

In the case of a minor, the amount payable to him must be paid into court (*o*).

As to agreements with minors, *vide Rhodes v. Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191; 2 B. W. C. C. 377; Workmen's Compensation Rules, 1907, 42 (6).

Emigration of disabled workman.

“If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature” (*p*).

Non-assignability of payments.

“A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off (*q*) against the same” (*r*).

Costs.

As to costs of proceedings under this Act, *vide* Workmen's Compensation Act, 1906, Schedule II. (7); also rule 61 (1907, amended 1908).

Sub-contractors.

Liability of employer or principal.

Sub-contract.—“Where any person (in this section referred to as the principal) in the course of or for the purpose of his trade or business contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him . . . the amount of compensation shall be calculated with reference to the earnings of the workman under his immediate employer” (*s*).

“Where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and

(*n*) *Ryan v. Hartley*, [1912] 2 K. B. 150; 5 B. W. C. C. 407.

(*o*) W. C. Act, 1906, rule 50a, dated 14th May, 1909.

(*p*) W. C. Act, 1906, Schedule I. (18).

(*q*) Cf. *Rosewell Gas Coal Co., Ltd. v. McVicar*, (1905) 42 S. L. R. 233; 7 F. 290.

(*r*) W. C. Act, 1906, Schedule I. (19).

(*s*) W. C. Act, 1906, s. 4 (1).

he alone shall be liable under this Act to pay compensation to any workman employed by him on such work" (t).

"Nothing in the above section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal" (u).

The above section only applies to cases of accidents occurring "on, in, or about premises on which the principal has undertaken to execute the work, or which are otherwise under his control or management" (x).

"Where the principal is liable to pay compensation under the above section, he shall be entitled to be indemnified by any person who would have been liable independently of that section (y). All questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by arbitration under this Act" (y).

Right to indemnity from sub-contractor.

The indemnity will include costs properly incurred in prior proceedings (z). Such costs would probably not include any costs incurred in an appeal (a).

The principal may claim an indemnity even though compensation has been paid under an agreement without arbitration. In such a case, however, the contractor, having had no notice served upon him under rule 19, is at liberty to contest the reasonableness of the principal's payment (b), both as to its amount and, indeed, as to the primary question of liability.

Any dispute between the principal and contractor must now, it appears, be settled by arbitration under this Act in default of agreement (c).

Third Parties.

"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

"(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and

Liability of employer.

"(2) If the workman has recovered compensation under this

Right to indemnity

(t) W. C. Act, 1906, s. 4 (1).

(u) W. C. Act, 1906, s. 4 (3).

(x) W. C. Act, 1906, s. 4 (4).

(y) W. C. Act, 1906, s. 4 (2).

(z) *G. N. Ry. Co. v. Whitehead*, (1902) 18 T. L. R. 816; 4 W. C. C. 39; cf. *Hammond v. Bussey*, (1887) 20 Q. B. D. 79. *Vide infra*, Chap. XII., section 3.

(a) Cf. *Maxwell v. British Thomson Houston Co., Ltd.*, [1904] 2 K. B. 342.

(b) Cf. *Thompson & Sons v. N. E. Marine Engineering Co.*, [1903] 1 K. B. 428, per Kennedy, J., at p. 437; *Hammond v. Bussey*, (1887) 20 Q. B. D. 79.

(c) W. C. Act, 1906, s. 4 (2); cf. *Evans v. Cook*, [1905] 1 K. B. 53, under the Act of 1897.

from third party.

Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act" (*d*).

It has been held that under this section the person recovering the compensation and the person to whom the wrong-doer was liable to pay damages need not be the same person (*e*). Thus, even an illegitimate dependant may recover in case of the workman's subsequent death from his injury (*e*).

But, of course, the person sued may raise a defence, *e.g.*, contributory negligence on the part of the workman, or other workmen of the employer, which the employer might be prevented from raising in a claim brought by a workman under the Act (*f*).

Where a workman has been killed or injured in consequence of defective plant or mechanical power supplied to the employer, the latter may be able to recover, in an action for breach of contract against the person who supplied the defective plant, the amount of compensation paid to the workman or his relatives, together with the costs incurred (*g*).

Fellow-workman may be third party.

It has now been decided that an employer may sue a workman under section 6 for an indemnity for compensation payable to a fellow-workman in cases where the injury has been caused to one workman by a fellow-workman's negligence (*h*).

As in the case of indemnity between a principal and a contractor—*vide supra*, p. 259—an indemnity under this section may be claimed, even though the compensation is paid by agreement, and it will include costs properly incurred in prior proceedings.

Procedure.

It is to be observed that under section 6 any question as to a right to and the amount of an indemnity from a third party may be determined by an action brought in the High Court or—if within its jurisdiction—in the county court, or such question may be determined by agreement or arbitration (*i*). Under section 4 the question as to a right to and the amount of an indemnity between a principal and a contractor can only be determined by arbitration—in default of agreement. (As to procedure for claiming indemnity under sections 4 and 6 of the Workmen's Compensation Act, 1906, *vide* rules 19 and 24 of the Act.)

(*d*) W. C. Act, 1906, s. 6.

(*e*) *Smith's Dock Co. v. John Readhead & Sons*, [1912] 2 K. B. 323 ; 5 B. W. C. C. 450.

(*f*) *Cory & Son, Ltd. v. France, Fenwick & Co.*, [1911] 1 K. B. 114.

(*g*) *Bentley v. Macaulfe*, [1906] 2 K. B. 548 ; cf. *Scott v. Foley*, (1899) 16 T. L. R. 55.

(*h*) *Lees v. Dunkerley*, (1910) 103 L. T. 467 ; 55 S. J. 44 ; 4 B. W. C. C. 115.

(*i*) Cf. *Bute v. Worsey*, (1912) 5 B. W. C. C. 276.

General Liability of Employer.

"When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation . . . both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid" (*k*).

Compensation
and damages
not both
recoverable.

If a workman brings an action independently of the Workmen's Compensation Act, 1906, and fails to recover damages, the court before which the action is tried shall, upon the workman's application, proceed to assess compensation under the Workmen's Compensation Act, 1906—if there be a valid claim thereunder (*l*). If such application be not made, the plaintiff as applicant can bring no other proceedings for compensation against the employer (*m*). Furthermore, there can be no assessment of compensation under the Workmen's Compensation Act, 1906, s. 1 (4), unless the proceedings taken independently of the Workmen's Compensation Act have been brought within six months of the occurrence of the accident (*n*).

Procedure.

If a workman brings a claim under the Workmen's Compensation Act, 1906, and fails—final judgment having been given—he cannot bring another action at common law (*n*).

If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed (*o*).

Serious and
wilful mis-
conduct of
injured work-
man.

It would appear that the misconduct must be of a deliberate character, if the claim is to be disallowed (*p*).

Disablement may be serious though the physical deformity produced be slight (*q*).

(*k*) W. C. Act, 1906, s. 1 (2) (b).

(*l*) Cf. W. C. Act, 1906, s. 1 (4).

(*m*) *Cribb v. Kynoch, Ltd.*, [1908] 2 K. B. 551; 1 B. W. C. C. 43.

(*n*) *Burton v. Chapel*, (1909) 46 S. L. R. 375; 2 B. W. C. C. 120.

(*o*) W. C. Act, 1906, s. 1 (2) (c).

(*p*) *Johnson v. Marshall, Sons & Co., Ltd.*, [1906] A. C. 409; 8 W. C. C. 10.

(*q*) *Hopwood v. Olive and Partington, Ltd.*, (1910) 3 B. W. C. C. 357.

SECTION V.

Agricultural Holdings Act, 1908.*Compensation under the Agricultural Holdings Act, 1908.*

The Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), consolidates into one Act a series of former Acts which are now repealed. These are—

- (1) The Agricultural Holdings (England) Act, 1883.
- (2) The Tenants' Compensation Act, 1890 (in part).
- (3) The Market Gardeners' Compensation Act, 1895.
- (4) The Agricultural Holdings Act, 1900.

(5) The Agricultural Holdings Act, 1906. This Act, otherwise known as the Land Tenure Bill, never actually came into operation.

- (6) Section 38 of the Small Holdings and Allotments Act, 1907.

The Acts of 1900 and 1906 are not repealed so far as they relate to Scotland.

The Agricultural Holdings Act, 1908, has four schedules appended to it. The provisions of the Act make frequent reference to these schedules. The Act deals—*inter alia*—with the right of an agricultural tenant to receive compensation for improvements made upon his holding in the course of his tenancy. It has been said that the Act “goes a long way towards getting rid of some of the old common law doctrines of waste” (r).

Right of
tenant to
compensation
for improve-
ments.

It is enacted by section 1 of the Act that “where a tenant of a holding(s) has made thereon any improvement comprised in the First Schedule (t) . . . he shall be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord as compensation . . . such sum as fairly represents the value of the improvement to an incoming tenant.”

Benefit
granted by
landlord.

It is further provided that “in the ascertainment of the amount of compensation payable . . . there shall be taken into account:—

- (1) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and (2) as respects manuring (u) as defined by the Act, the value of the manure required by the contract of tenancy, or by custom, to be returned to the holding in respect of any crops sold off or

Manuring.

(r) Cf. *Meux v. Copley*, [1892] 2 Ch. 253, *per* Kekewich, J., at p. 264.

(s) “Holding” means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord. *Vide* Agricultural Holdings Act, 1908, s. 48.

(t) *Vide infra*, pp. 264, 265.

(u) For definition of “manuring,” *vide* Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 48.

removed from the holding, within the last two years of the tenancy or other less time for which the tenancy has endured, not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed" (x).

The measure of compensation is, in accordance with the above section, to be determined upon the basis of the "value of the improvement to an incoming tenant"—not upon the basis of the expense incurred in making the improvement. Basis of compensation.

In assessing the value of the improvement, the proper method to adopt would appear to be to ascertain, first of all, the increased rent which an incoming tenant might reasonably be expected to pay, over and above the ordinary rental of the same land, if the improvement had not been effected. In ascertaining such increased rental, the amount, it is submitted, should not be enhanced by any such factor as the inherent capabilities of the soil, nor should the amount be based upon the consideration of a hypothetical rent obtainable had the land merely been permitted to lie fallow. It is not intended that the landlord's interest in the soil should be unduly cut down, though, presumably, the alteration from the corresponding provision of the Act of 1900 is not without significance (y). The latter Act expressly provided that there should not be taken into account, as part of the improvement, what was justly due to the inherent capabilities of the soil. The Act of 1908 omits this qualification.

Having ascertained the amount of the increased rental, the value of the improvement may be calculated by capitalising such rental at so many years' purchase as the improvement would be likely to enure for the benefit of the land—subject, of course, to any of the deductions specified in section 1, as set out above. (*Vide* p. 262.)

It is further provided that the above enactments shall in no way prejudice the right of a tenant to claim any compensation to which he may be entitled under custom, agreement, or otherwise, in lieu of any compensation provided in the manner set out above (z).

The effect of the last-mentioned provision is to enable a tenant to claim compensation in one of four ways, namely— Procedure.

- (1) under the Act;
- (2) under custom;
- (3) under agreement (a);
- (4) otherwise.

(x) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 1, sub-s. 2.

(y) Cf. Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 1, sub-s. 1.

(z) Agricultural Holdings Act, 1908, s. 1, sub-s. 3.

(a) But the agreement must not cut down the tenant's rights as specified in the Act. Cf. *Cathcart v. Chalmers*, [1911] A. C. 246.

In cases where a tenant has a claim for compensation arising under several different heads, he may, it would appear, bring separate claims in respect of separate and distinct improvements and employ any one of the above four methods of procedure in respect of each claim (*b*). He cannot, however, make precisely the same claim by more than one method of procedure. Furthermore, so far as agreements are concerned, it is to be observed that there are special provisions dealing with special particular improvements, which prevent claims from being made, except under an agreement, in certain cases.

Compensation
for per-
manent im-
provements.

Thus, it is enacted by section 2 of the Agricultural Holdings Act, 1908, that "compensation under the Act shall not be payable in respect of any improvement comprised in Part I. of the First Schedule of the Act (*c*), unless the landlord of the holding has, previously to the execution of the improvement, consented in writing to the making of the improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, and if any such agreement is made, any compensation payable under the agreement shall be substituted for compensation under the Act."

Consent of
landlord
necessary.

It is to be observed that a landlord cannot impose, as a condition of his consent, a term to the effect that no compensation at all shall be paid (*d*). Furthermore, the consent to the improvement may be implied from the terms of the lease (*e*).

Compensa-
tion for
drainage.

Again, it is enacted by section 3 of the Agricultural Holdings Act, 1908, that "compensation under this Act shall not be payable in respect of any improvement comprised in Part II. of the First Schedule of the Act (*f*), unless the tenant of the holding has, not more than three nor less than two months before beginning to execute the improvement, given to the landlord notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given the landlord and the tenant may agree on the

Notice to
landlord
necessary.

(*b*) Cf. *Smith v. Devonshire (Duke of)*, (1906) 22 T. L. R. 619.

(*c*) These improvements are:—(1) Erection, alteration, or enlargement of buildings; (2) formation of silos; (3) laying down of permanent pasture; (4) making and planting of osier beds; (5) making of water meadows or works of irrigation; (6) making of gardens; (7) making or improvement of roads or bridges; (8) making or improvement of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes; (9) making or removal of permanent fences; (10) planting of hops; (11) planting of orchards or fruit bushes; (12) protecting young fruit trees; (13) reclaiming of waste land; (14) warping or weiring of land; (15) embankments and sluices against floods; (16) erection of wire work in hop gardens. (N.B.—Part I. of the First Schedule is subject, as to market gardens, to the provisions of the Third Schedule, as to which *vide infra*, p. 267.)

(*d*) *Mears v. Callender*, [1901] 2 Ch. 388, *per* Cozens-Hardy, J., at p. 399.

(*e*) *Mears v. Callender*, *ubi supra*.

(*f*) Drainage is the only improvement comprised in Part II. of the First Schedule.

terms as to compensation or otherwise on which the improvement is to be executed.

“If any such agreement is made, any compensation payable under the agreement shall be substituted for compensation under the Act. In default of any such agreement, the landlord may, unless the notice of the tenant is previously withdrawn, execute the improvement in any reasonable and proper manner which he thinks fit and recover from the tenant, as rent, a sum not exceeding five per cent. per annum on the outlay incurred, or not exceeding such annual sum payable for a period of twenty-five years as will repay that outlay in that period with interest at the rate of three per cent. per annum :

“Provided that if the landlord fails, within reasonable time, to execute the improvement, the tenant may execute the improvement, and shall in respect thereof be entitled to compensation under the Act.”

The landlord and tenant, however, may by the agreement of tenancy, or otherwise, agree to dispense with any notice required under the above section and may make any agreement they choose upon the subject of the improvement, and such agreement shall be as valid as though the statutory notice had been given (*g*). Such agreement to dispense with notice need not be in writing (*h*).

It is further enacted by section 4 of the Agricultural Holdings Act, 1908, that “where any agreement in writing secures to the tenant of a holding for any improvement comprised in Part III. of the First Schedule of the Act (*i*) fair and reasonable compensation, having regard to the circumstances existing at the time of making the agreement, the compensation so secured shall, as respects that improvement, be substituted for compensation under the Act.”

Agreements as to improvements for which landlord's consent is not necessary.

It will be observed that the terms of this latter section differ materially from those of sections 2 and 3, quoted above, in that the compensation payable by agreement must, in order to exclude the operation of the Act, be “fair and reasonable.” Sections 2

(*g*) Agricultural Holdings Act, 1908, s. 3, sub-s. 4.

(*h*) *Ogilby v. Elliott*, (1905) 7 F. (Ct. of Sess.) 1115.

(*i*) The improvements are as follows, and neither the landlord's consent nor notice to him in respect thereof is required :—(18) Chalking of land ; (19) clay-burning ; (20) Claying ; (21) liming ; (22) marling of land ; (23) application to land of purchased artificial or other purchased manure ; (24) Consumption on the holding by cattle, sheep or pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding stuff not produced on the holding ; (25) consumption on the holding by cattle, sheep or pigs, or by horses other than those regularly employed on the holding, of corn proved by satisfactory evidence to have been produced and consumed on the holding ; (26) laying down temporary pasture with clover, grass, lucerne, sainfoin or other seeds, sown more than two years prior to the determination of the tenancy ; (27) repairs to buildings, being buildings necessary for the proper cultivation or working of the holding other than repairs which the tenant is himself under an obligation to execute : provided the tenant gives the landlord due notice of intention to execute the repairs.

and 3 make no qualification at all with regard to the reasonableness of the amount of compensation.

If dispute arise as to the adequacy of the amount payable under an agreement within the purview of section 4, the matter may apparently be decided, under section 6, sub-section 1, of the Act, by arbitration.

Avoidance of contract inconsistent with the Act.

Section 5 of the Agricultural Holdings Act, 1908, provides that, subject to the foregoing provisions of the Act, any contract made by a tenant of a holding by virtue of which he is deprived of his right to claim compensation, under the Act, in respect of any improvement comprised in the First Schedule thereto, shall be void so far as it deprives him of that right.

Determination of claims to compensation.

Section 6 of the Agricultural Holdings Act, 1908, provides that any dispute between the landlord and tenant upon the question of compensation for improvements, comprised in the First Schedule to the Act, shall be settled by arbitration, whether the claim be made under the Act, or under custom or agreement or otherwise.

Right of tenant who has paid compensation to outgoing tenant.

Section 7 provides for the reimbursement by the landlord to an incoming tenant of any compensation payable under the Act and actually paid by the incoming tenant to an outgoing tenant with the landlord's consent in writing.

Restriction in respect of improvements by tenant about to quit.

Section 9 restricts compensation under the Act to improvements begun more than one year before the expiration of the term of tenancy, except in the case of manuring. There are also one or two other minor exceptions to the general restricting rule as just stated.

Damage by game.

Sections 10 and 11 enact that in proper circumstances, therein set out, compensation may be recovered from the landlord for damage by game, and for unreasonable disturbance, respectively.

Unreasonable disturbances.

"Unreasonable disturbance" means giving notice to quit or withholding a renewal of the lease for reasons "inconsistent with good estate management," or unreasonably demanding an increase in rent, which demand causes the tenant to quit. The compensation payable, and the right to it, under these two sections are to be determined by arbitration, in default of agreement.

Taking of possession by mortgagee.

Section 12 provides for the recovery, by the tenant of a holding, of compensation from a mortgagee who takes possession.

Procedure in arbitration.

Section 13 deals with procedure in arbitration under the Act.

Recovery of compensation.

Section 14 enacts that any sum agreed or awarded under the Act, if not paid in fourteen days, can be recovered, except as against a trustee or mortgagee landlord, upon order made by the county court, in the same manner as money ordered by a county court to be paid under its ordinary jurisdiction.

Probably an application for an order under this section would not be deemed to be in the nature of an action, so that

the respondent would therefore be unable to put forward a set-off or counterclaim.

Section 15 gives power to a landlord who has paid compensation to a tenant, under the Act, for any improvement comprised in the First Schedule thereto, to obtain a charge upon the holding for the repayment of the amount so paid.

Charge on holding for compensation.

Section 21 gives power to a landlord to purchase from a tenant any fixture or building which the tenant might otherwise be allowed to remove. This section is also declaratory of the law relating to tenants' fixtures on holdings, and the conditions under which they may be removed.

Tenant's property in fixtures and buildings.

Section 25 enacts that a landlord shall not be able to recover from the tenant of a holding any sum whatever, in excess of the damage actually sustained by him, in consequence of a breach by the tenant of a term or condition in the contract of tenancy.

Penal rents and liquidated damages.

The section, however, does not apply to conditions against the breaking up of permanent pasture, grubbing of underwoods, or injuring or cutting of trees, or to conditions regulating the burning of heather.

Section 28 limits the power of a landlord to distrain for rent of a holding to such amount as may have accrued within the year prior to the making of the distress.

Distress for rent.

Sections 29 and 30 enact provisions regulating the procedure of distress.

Section 31 provides that a landlord who distrains for rent must deduct from the amount thereof any compensation for improvements due under this Act, or under agreement or custom, and must only distrain for the balance.

Market Gardens.—Section 42 enacts that "in the case of a holding in respect of which it is agreed by an agreement in writing (*k*), made on or after January 1st, 1896, that the holding shall be let or treated as a market garden—(1) the provisions of this Act shall apply as if the improvements comprised in the Third Schedule to this Act (*l*) were comprised in Part III. of the First Schedule to this Act" (*m*).

Special provisions as to market gardens.

The same section also provides that an incoming tenant of a market garden may recover compensation in respect of an improvement which he has purchased, although the landlord has not consented to the purchase from the outgoing tenant (*n*).

(*k*) Presumably, in the case of a written lease or tenancy agreement, the intention to treat the holding as a market garden might, in proper cases, be inferred from the terms thereof.

(*l*) These improvements are :—(1) Planting of standard or other fruit trees permanently set out ; (2) planting of fruit bushes permanently set out ; (3) planting of strawberry plants ; (4) planting of asparagus, rhubarb, and other vegetable crops, which continue productive for two or more years ; (5) erection or enlargement of buildings for the purpose of the trade or business of a market gardener.

(*m*) *Vide supra*, pp. 265, 266.

(*n*) Cf. section 7 at p. 266, *supra*.

The same section further provides that the provisions of the Act relating to tenants' property in fixtures (as to which *vide supra*, p. 267) shall extend to fixtures erected for the purpose of the tenant's trade as market gardener.

The same section further provides that a tenant may remove all fruit trees and bushes planted by him, and not permanently set out; but, if the tenant does not remove them prior to the determination of his tenancy, they shall remain the property of the landlord and the tenant shall be unable to claim compensation therefor (o).

The same section further provides that in the case of contracts of tenancy of a holding, current on January 1st, 1896, it is not necessary that there should be an agreement in writing between the landlord and the tenant that the holding shall be treated as a market garden, in order that the holding may come within the purview of this section.

It will suffice, except in the case of a tenancy from year to year, if the tenant can show that, on the above date, the holding was in use as a market garden to the landlord's knowledge, and that he, the tenant, had then executed thereon any of the improvements comprised in the Third Schedule to the Act, without receiving any written notice of dissent from the landlord.

Section 48 gives a list of definitions of terms employed in the wording of the Act.

Interpretation.

SECTION VI.

Actions for Breach of Statutory Duty and for Statutory Penalties.

Action for Breach of Statutory Duty.

Public statute.

Breach of a statute, framed for the protection and benefit of the public in general, only sounds in damages in cases where the plaintiff can prove that he has incurred some special damage in excess of that sustained by the community at large, in consequence of the defendant's act of infringement (p).

In this respect, an action for breach of such statutory duty resembles one for public nuisance (q).

Private or limited statute.

Where, on the other hand, the statute which has been infringed was obviously framed for the protection and benefit of a particular party or class of persons, such party, or one of such

(o) Cf. *Watherell v. Howells*, (1808) 1 Camp. 227.

(p) *Chamberlaine v. Chester and Birkenhead Ry. Co.*, (1848) 1 Exch. 870, at pp. 876 and 877.

(q) Cf. *Rose v. Groves*, (1843) 5 M. & G. 613; *Benjamin v. Storr*, (1874) L. R. 9 C. P. 400.

class of persons, may sue, without necessarily alleging that he has incurred special damage (*r*), although he must show, of course, that he is aggrieved.

In such cases, if special damage be not alleged, the damages are "at large" (*s*), and, even if it be alleged (*t*), the measure of damages is not necessarily restricted to the amount of special damage proved (*t*).

It is to be observed, however, that a breach of statutory duty will not constitute the foundation for a private right of action, unless the following requirements are satisfied:—

Require-
ments neces-
sary for cause
of action on a
statute.

(1) The plaintiff must be aggrieved by the particular form of injury which the infringed statute was intended to prevent (*u*).

(2) The plaintiff, in the case of an action for infringement of a statute passed to protect a particular class of persons, must belong to the class which the statute intended to protect (*x*).

If these two conditions be fulfilled, and the duty imposed upon the defendant by the statute be an absolute one, the defendant cannot escape liability by pleading a common law defence, such as "common employment" (*y*), though, perhaps, he might in cases where the duty is not absolute and where it is incumbent upon the plaintiff to prove actual negligence on the part of the defendant or his servants (*y*).

It is essential to ascertain, in cases where liability has been incurred in respect of a statutory duty, the procedure by which the plaintiff may enforce his remedy.

Procedure.

Thus, it has been declared in the course of an important judgment that "there are three classes of cases in which a liability may be established founded upon a statute. (1) One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. (2) The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of

(1) Common
law liability
affirmed.

(2) Statutory
right pro-
vided but not
remedy.

(*r*) *Chamberlaine v. Chester and Birkenhead Ry. Co.*, (1848) 1 Exch. 870, at p. 877; *Mayor, etc. of Devonport v. Plymouth Tramway Co.*, (1884) 52 L. T. 161; cf. *Pickering v. James*, (1873) L. R. 8 C. P. 481, per Brett, J., at pp. 509 and 510; cf. also *Bridgland v. Shapter*, (1839) 5 M. & W. 375.

(*s*) *Pickering v. James*, *ubi supra*, per Brett, J., at p. 509.

(*t*) *Cf. Dormont v. Furness Ry. Co.*, (1883) 11 Q. B. D. 496.

(*u*) *Gorris v. Scott*, (1874) L. R. 9 Ex. 125; cf. *Ward v. Hobbs*, (1878) 4 App. Cas. 13.

(*x*) *Cf. Ward v. Hobbs*, *ubi supra*; *Atkinson v. The Newcastle and Gateshead Waterworks Co.*, (1877) 2 Ex. D. 441.

(*y*) *Cf. Groves v. Wimborne*, [1898] 2 Q. B. 402, at pp. 410, 412, 413, 418, and 419; *David v. Britannic Merthyr Coal Co.*, [1910] A. C. 74; *Watkins v. Naval Colliery Co.*, [1912] W. N. 214.

(3) Statutory right and remedy provided.

remedy; there, the party can only proceed by action at common law. But there is a third class, viz., (3) where a liability not existing at common law is created by a statute which, at the same time, gives a special and particular remedy for enforcing it. In such a case, the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to" (z).

(1) Cumulative and exclusive remedies.

(1) The cases falling within class (1) must be divided into two sub-classes, that is to say, into the class in which the remedy is cumulative, and the class in which the remedy provided by statute abrogates the pre-existing common law remedy. As stated in the judgment of Willes, J., quoted above, it is a question in each case, to be decided upon the proper interpretation of the statute, whether the fresh statutory remedy provided is exclusive or cumulative.

Thus, where the conservators of a river possessed statutory power to detain boats in respect of which there subsisted unpaid dues, this right was held not to prevent the bringing of a common law action of debt (a).

In another case, where a certain statute provided that a person who misapplied certain particular moneys should, on summary conviction, be liable to a penalty *and to be ordered to repay all moneys improperly applied*, and in default of such repayment, or of the payment of the penalty, should be imprisoned, it was held that an order made under such statute was a bar to an action at common law for the recovery of the same moneys (b).

Alternative remedy.

But it was held in this case that, if a civil action had been brought in the first instance, the existence of the statute would have afforded no bar to such action; so that in this case the statute may be said to have afforded an alternative, rather than a cumulative, remedy (c).

On the other hand, in a case under the Merchant Shipping Act, 1854, it was held that the power conferred upon the justices, under that Act, of directing a forfeiture of a deserting sailor's wages afforded an exclusive remedy, and prevented the bringing of an action for breach of contract (d).

Successive statutes.

Similarly, subsequent statutes, which successively deal with

(z) *The Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 C. B. N. S. 336, per Willes, J., at p. 356. As to the necessity of adhering to the procedure prescribed by the Act, *vide Barraclough v. Brown*, [1897] A. C. 615.

(a) *G. W. Ry. Co. v. Sharman*, (1892) 61 L. J. Q. B. 600; cf. *Sharp v. Warren*, (1818) 6 Price, 131; *Stevens v. Chown*, [1901] 1 Ch. 894; *Crystal Palace Gas Co. v. Idris*, (1900) 82 L. T. 200; cf., however, *Fraser v. Fear*, [1912] W. N. 227.

(b) *Vernon v. Watson*, [1891] 2 Q. B. 288.

(c) *Vernon v. Watson*, *ubi supra*, per Lord Esher, M.R., at p. 292; cf. *Ex parte Clayton*, (1830) 1 R. & M. 369; cf., also, *Parry v. Croydon Commercial Gas Co.*, (1863) 15 C. B. N. S. 568, at p. 576.

(d) *G. N. Fishing Co. v. Edgehill*, (1883) 11 Q. B. D. 225.

the same matter and only add accumulative penalties, do not repeal former statutes (*e*), unless it clearly appears that the later statute is intended to rescind the remedy provided by the prior one (*f*).

(2) Where the statute gives a right to sue, but prescribes no particular form of remedy or procedure, the plaintiff must proceed by action at common law (*g*), and the powers of the court in which the action is brought to enforce obedience to the statute would be those ordinarily vested in such court (*h*).

(2) Remedy not provided.

(3) In cases where a statute creates a liability not existing at common law, and also provides a special and particular remedy for enforcing such liability, the plaintiff is restricted to the remedy so provided (*i*).

(3) Remedy provided.

But this rule is subject to the qualification that the remedy supplied must cover the whole right given (*k*).

It was held in one case that, where a statute creates an obligation, for breach of which a penalty may be recovered merely by a common informer, a person who has sustained special damage may, none the less, bring an action for damages at common law (*l*).

Damages recoverable as well as penalty.

But, in a later case, it was questioned whether the principle governing such cases really depended upon the destination of the penalty imposed (*m*); and, in one recent case, an action at common law was held to be maintainable, for breach of statutory duty, even though the statute imposing such duty provided that the penalty to be inflicted, for breach thereof, might be given to the person injured (*n*).

It would therefore appear that, in each case, the question as to whether the right of action at common law does, or does not, exist must be determined by regarding the phraseology and general purview of the particular statute (*o*).

It is to be observed that where a statute creates a new offence, Injunction.

(*e*) *R. v. Jackson*, (1775) Cowp. 297; cf. *Ross v. Rugge-Price*, (1876) 1 Ex. D. 269.

(*f*) *O'Flaherty v. McDowell*, (1857) 6 H. L. C. 142, at p. 157; cf. *Parry v. Croydon Commercial Gas Co.*, (1863) 15 C. B. N. S. 568, at p. 576; *Pietermaritzburg Corporation v. Natal Land Co.*, (1888) 13 App. Cas. 478.

(*g*) 6 C. B. N. S., at p. 356; cf. *Ross v. Rugge-Price*, *ubi supra*; *Dormont v. Furness Ry. Co.*, (1883) 11 Q. B. D. 496.

(*h*) Cf. *Green v. Penzance (Lord)*, (1881) 6 App. Cas. 657, *per* Lord Selborne, at p. 675.

(*i*) 6 C. B. N. S. 356; *Doe v. Bridges*, (1831) 1 B. & Ad. 847, at p. 859; *Bailey v. Bailey*, (1884) 13 Q. B. D. 855, *per* Brett, M.R., at p. 859; *Barraclough v. Brown*, [1897] A. C. 615; cf. *R. v. Hall*, [1891] 1 Q. B. 747; *Passmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387; *Fraser v. Fear*, [1912] W. N. 227.

(*k*) *Stubbs v. Martin*, [1895] 2 Ir. R. 70.

(*l*) *Couch v. Steel*, (1854) 3 E. & B. 402.

(*m*) *Atkinson v. Newcastle Waterworks Co.*, (1877) 2 Ex. D. 441, at pp. 447—449; cf. *Municipality of Picton v. Geldert*, [1893] A. C. 524; *Saunders v. Holborn District Board*, [1895] 1 Q. B. 64.

(*n*) *Groves v. Wimborne (Lord)*, [1898] 2 Q. B. 402.

(*o*) *Atkinson v. Newcastle Waterworks Co.*, *ubi supra*, *per* Lord Cairns, at p. 448 cf. *Morris and Bastert v. Loughborough Corporation*, [1908] 1 K. B. 205.

and imposes a penalty, the ancillary remedy by injunction may, none the less, be claimed (*p*).

Penalties.

Penalty—
single or
cumulative.

Where the remedy, provided for breach of a statutory duty, is the recovery of a penalty, whether at the suit of a common informer, the party aggrieved, the Crown, or some person specified by the statute, the question may arise as to whether the penalty recoverable is single or cumulative, and as to whether the offence, if committed by several persons together, is single or several.

Each case must be considered, separately, on its own merits, and the wording of the particular statute, under which proceedings are brought, must be regarded, to determine whether the penalty is intended to be imposed in respect of an habitual or continuous course of conduct (*q*), or in respect of isolated acts (*r*).

Common
informers.

In the former class of cases, *i.e.*, where the penalty is not cumulative, it follows that two separate common informers cannot each recover the statutory penalty (*s*).

Multiple
offenders.

Where an offence, created, or made penal, by statute, is, in its nature, single, one single penalty only can be recovered, though several persons join in committing it; but if the offence is, in its nature, several, each offender is separately liable to the penalty (*t*).

Recovery by
the Crown.

Where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown, alone, can maintain a suit for it (*u*).

Furthermore, where the whole, or a moiety, of the penalty may be sued for by any informer, the Crown may, none the less, recover the whole penalty, unless forestalled by an informer (*x*).

Pawnbrokers'
Act, 1800.

It may be observed that a common informer, who lays an information against a pawnbroker for an offence under 39 & 40 Geo. 3, c. 99, is entitled to a moiety of the penalties imposed by section 27 on the offending party (*y*).

(*p*) *Cooper v. Whittingham*, (1880) 15 Ch. D. 501.

(*q*) *Cf. Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89; *Crepps v. Durden*, (1777) Cowp. 640; *R. v. Brown*, [1895] 1 Q. B. 119, at p. 132; *Pilcher v. Stafford*, (1864) 4 B. & S. 775.

(*r*) *Cf. Saunders v. Baldy*, (1865) 6 B. & S. 791; *Milnes v. Bale*, (1875) L. R. 10 C. P. 591; *Ex parte Beal*, (1868) L. R. 3 Q. B. 387.

(*s*) *Garrett v. Messenger*, (1867) L. R. 2 C. P. 583; *cf. Parry v. Croydon Commercial Gas Co.*, (1863) 15 C. B. N. S. 568, at pp. 576–578.

(*t*) *R. v. Clark*, (1777) Cowp. 610; *cf. R. v. Littlechild*, (1871) L. R. 6 Q. B. 293.

(*u*) *Bradlaugh v. Clarke*, (1883) 8 App. Cas. 354.

(*x*) *R. v. Clark*, (1777) Cowp. 610; *R. v. Hymen*, (1798) 7 T. R. 536.

(*y*) *Caswell v. Morgan*, (1859) 1 El. & El. 809.

CHAPTER XI.

- Section I.—Principal and Agent.
 „ II.—Executors and Administrators.
 „ III.—Trustee in Bankruptcy.

THE principles of law relating to actions brought by or against principals or agents, and by or against executors, and by or against trustees in bankruptcy, are, in the main, similar to those obtaining in actions brought by ordinary parties. But there are certain rules specially applicable to actions brought by or against the above-mentioned classes of persons, and to the measure of damages which may be recovered in such actions. In the present chapter the special points which are noteworthy in connection with such actions will be dealt with.

SECTION I.

Principal and Agent.

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Action by Principal against Agent.

Where an agent enters into a contract of agency with his principal, a duty is laid upon him of observing the conditions of the contract of agency and performing his office with reasonable care. Duty entailed by contract of agency.

In an action brought, by a principal against his agent, for negligence or other breach of duty, the measure of damages is the loss actually sustained by the principal—provided the elements constituting such loss be not too remote (a). In short, the defaulting agent is liable for such damages as might reasonably have been anticipated to accrue from his negligence or breach of duty (a). Measure of damages.

To the above rule, that the measure of damages is restricted to the loss actually sustained by the principal, there are two apparent exceptions. Actual loss.

In the first place, where a clear breach of duty by the agent is proved, nominal damages can be recovered, even though no actual Nominal damages.

(a) *Cassaboglou v. Gibb*, (1882) 11 Q. B. D. 797; *Salvesen v. Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302; *Becker v. Medd*, (1897) 13 T. L. R. 313; cf. *In re United Service Co.*, (1870) L. R. 6 Ch. 212; *Fisher v. Val de Travers Co.*, (1876) 1 C. P. D. 511; cf., also, *Mainwaring v. Brandon*, (1818) 2 Moore, 125, at p. 134; *Pape v. Westacott*, [1894] 1 Q. B. 272.

or special damage has resulted (*b*). In such a case, the law presumes an incurring of general damage to a nominal extent by reason of the breach of contract (*b*).

Bankers'
cheques, etc.

In the second place, where an agent, who has money of his principal in hand, refuses or neglects to apply it as directed in honouring the cash orders of his principal, substantial damages may be recovered against him by the principal, without proof of actual damage (*c*). In such a case, injury to the principal's credit and reputation may be presumed just as in an action for slander on a man in the conduct of his business (*c*). Of course, if specific damage to the principal's credit can be proved, damages in respect of it can be recovered, since it is not deemed too remote (*d*).

Gratuitous
agency.

If an agent is acting gratuitously, the duty of care imposed upon him is only relative, and damages can only be recovered against him if it is proved, both, that special damage has been sustained, and that he has acted with gross negligence (*e*). But a gratuitous agent is clearly liable for gross negligence (*f*), and he may be held liable if he fails to employ such skill as he actually possesses, or by his profession, or otherwise, holds himself out to possess (*g*).

Remoteness
of damage.
Loss of profit.

In accordance with the general principles relating to damages, the measure of damages recoverable by a principal against an agent can only be computed, as stated above, upon the basis of those damages which might naturally have been expected to result from the agent's default. Thus, where an agent is instructed to purchase goods of a certain quality, and he buys goods of an inferior quality, the principal cannot recover from the agent the difference in value between the goods ordered and those in fact bought, but only the loss actually sustained in consequence of the agent's default. Such loss would comprise the amount of damages and costs incurred by the principal in consequence of reasonable claims made against him by sub-purchasers (*h*), but it would not comprise loss of profit sustained through a rise in the market price of the goods originally

(*b*) *Van Wart v. Woolley*, (1830) M. & M. 520; *Marzetti v. Williams*, (1830) 1 B. & Ad. 415; cf. *Godefroy v. Jay*, (1831) 7 Bing. 413, at p. 419; *Columbus Co. v. Clowes*, [1903] 1 K. B. 244.

(*c*) *Larios v. Bonany y Gurety*, (1873) L. R. 5 P. C. 346; *Rolin v. Steward*, (1854) 14 C. B. 595, at p. 607; cf. *Prehn v. Royal Bank of Liverpool*, (1870) L. R. 5 Ex. 92; *Boyd v. Fitt*, (1864) 11 L. T. 280; *Summers v. City Bank*, (1874) L. R. 9 C. P. 580; *Addis v. Gramophone Co.*, [1909] A. C. 488, at p. 491.

(*d*) *Boyd v. Fitt*, *ubi supra*.

(*e*) *Giblin v. McMullen*, (1869) L. R. 2 P. C. 317, at p. 337; cf. *Moffatt v. Bateman*, (1869) L. R. 3 P. C. 115.

(*f*) *Doorman v. Jenkins*, (1834) 2 A. & E. 256.

(*g*) *Wilson v. Brett*, (1843) 11 M. & W. 113; cf. *Dartnall v. Howard*, (1825) 4 B. & C. 345; *Whitehead v. Greetham*, (1825) 2 Bing. 464.

(*h*) *Mainwaring v. Brandon*, (1818) 2 Moore, 125, at p. 134; *Cassaboglou v. Gibb*, (1882) 11 Q. B. D. 797, at p. 798; cf. *Hammond v. Bussey*, (1887) 20 Q. B. D. 79.

ordered, since the relation of principal and agent differs from that of vendor and purchaser (*i*).

Where, however, an agent, contrary to his principal's instructions, sold stock at a date prior to the date fixed by the principal, the latter was held to be entitled to recover the difference in value between the prices on the two dates—the value having risen (*k*).

An agent who is commissioned to insure the property of his principal is liable, if he neglects to insure, or executes an invalid insurance, to refund to his principal the amount of damage sustained in case of loss (*l*). In fact, his liability is co-extensive with that of an underwriter (*l*). Insurance agency.

But there is some authority for the proposition that if the agent can show that, even had he performed his duties properly, his principal must inevitably and none the less have suffered damage to the same extent, such fact might serve to prevent the principal from recovering more than nominal damages (*m*). Thus, presumably, in the case referred to above,—*Michael v. Hart*—if the market price of the stock had fallen after the agent had improperly sold it, the principal could only have recovered nominal damages (*n*).

On the other hand, a proposition of this kind must be considered in conjunction with another principle which, subject to many exceptions and qualifications, governs the law relating to damages, namely, that evidence of intrinsic matter arising subsequently to a cause of action for breach of contract is inadmissible in reduction of damages (*o*).

Thus, in an action brought by a principal against his agent for breach of duty in failing to effect a valid insurance, it would appear that the cause of action arises as soon as the defendant has been guilty of negligence and the plaintiff has been thereby damnified, and it has been stated that that which happened subsequently does not necessarily determine the amount of damages to which the plaintiff is entitled (*p*).

If nothing had happened and a policy might still have been

(*i*) *Cassaboglou v. Gibb*, (1882) 11 Q. B. D. 797, per Brett, M.R., at p. 804; cf. *Salvesen v. Rederi Aktiebolaget Nordstjernen*, [1905] A. C. 302.

(*k*) *Michael v. Hart & Co.*, [1902] 1 K. B. 482; cf. *Shaw v. Holland*, [1900] 2 Ch. 305; *Waddell v. Blockley*, (1879) 4 Q. B. D. 678.

(*l*) *Smith v. Price*, (1862) 2 F. & F. 748; cf. *Maydew v. Forrester*, (1814) 5 Taunt. 615; *Royal Exchange Shipping Co. v. Dixon*, (1886) 12 App. Cas. 11; *Pape v. Westacott*, [1894] 1 Q. B. 272.

(*m*) Cf. *Davis v. Garrett*, (1830) 6 Bing. 716, per Tindal, C.J., at p. 724; cf., also, *Webster v. De Tastet*, (1797) 7 T. R. 157; *Cohen v. Kittell*, (1889) 22 Q. B. D. 680.

(*n*) Cf. *Batten v. Wedgwood Coal and Iron Co.*, (1886) 31 Ch. D. 346.

(*o*) Cf. *Hill v. Smith*, (1844) 12 M. & W. 618; *Alder v. Keighley*, (1846) 15 M. & W. 117, at p. 120; *Mondel v. Steel*, (1841) 8 M. & W. 858; see, however, *supra*, pp. 22, 33.

(*p*) *Charles v. Alin*, (1854) 15 C. B. 46, per Maule, J., at p. 66; cf. *Cahill v. Dawson*, (1857) 3 C. B. N. S. 106.

effected, the jury would consider what was probable; if the loss had happened when the action was brought, they might perhaps give the full amount; but it has been stated that they are not bound to do so (*q*). There are a variety of circumstances which they might properly take into their consideration—*e.g.*, as to whether the plaintiff reasonably tried to mitigate the effects of the breach of contract. Perhaps, after the loss, they would be bound not to give more than the amount of the actual loss, when no greater loss could happen (*q*). In this form of action, therefore, the measure of damages recoverable may depend upon the facts which have occurred and the actual data before the court at the particular time when the action is brought (*r*), and may therefore vary according to the date at which the action is brought.

Breach of warranty of authority.

An action for breach of warranty of authority is, *ex hypothesi*, ordinarily brought, not by a principal against his agent, but by a third party, and, in such cases, the plaintiff is entitled to recover all damage directly resulting from the defendant's wrongful assertion of authority, and, in fact, is entitled to be placed, more or less, in the same position as if the defendant had been duly clothed with authority (*s*). In such an action, the plaintiff may, therefore, recover loss of profits (*t*). But, where an agent, who is employed by his principal to conduct negotiations, makes an incorrect statement to him that he has concluded a certain contract on his behalf, the measure of damages recoverable by the principal is the loss actually sustained by him in consequence of the misrepresentation, and does not include loss of profits which the principal might have made had the representation been true (*u*). Such form of action is, in fact, one for breach of duty by the agent, and not for breach of warranty of authority (*u*).

False representation to principal.

Secret profits.

An agent can be compelled to account to his principal for secret profits made by him in connection with his agency, and to pay over the amount, as money received to the use of the principal, with interest at the rate of 5 per cent. from the date of the receipt of the bribe (*x*). Furthermore, the agent, by

(*q*) *Charles v. Altin*, (1854) 15 C. B. 46, *per* Maule, J., at p. 66; *cf. Cahill v. Dawson*, (1857) 3 C. B. N. S. 106.

(*r*) *Charles v. Altin*, *ubi supra*; *cf. Batten v. Wedgwood Coal and Iron Co.*, (1886) 31 Ch. D. 346. *Vide supra*, pp. 22, 23.

(*s*) *Collen v. Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647; *Spedding v. Nevell*, (1869) L. R. 4 C. P. 212; *Starkey v. Bank of England*, [1903] A. C. 114; *cf. Bank of England v. Cutler*, [1908] 2 K. B. 208.

(*t*) *Hughes v. Graeme*, (1858) 28 L. J. Ex. 74; *Godwin v. Francis*, (1870) L. R. 5 C. P. 295; *In re National Coffee Palace Co.*, (1883) 24 Ch. D. 367; *Meek v. Wendt*, (1888) 21 Q. B. D. 126.

(*u*) *Salvesen v. Rederi Aktiebolaget Nordstjernen*, [1905] A. C. 302.

(*x*) *Boston Deep Sea Fishery Co. v. Ansell*, (1888) 39 Ch. D. 339, at p. 372; *Mayor of Salford v. Lever*, [1891] 1 Q. B. 168; *cf. Powell and Thomas v. Evan Jones & Co.*, [1905] 1 K. B. 11; *Hay's Case*, (1875) L. R. 10 Ch. 593.

accepting a secret commission, forfeits his right to remuneration, and if the principal pays such remuneration in ignorance of the facts he can recover it back again (z).

Moreover, if the agent has been induced by the bribe to depart from his proper duty towards his principal, the latter can sue him, jointly or severally, with the person who bribed him, to recover any loss suffered by him—the principal—in consequence of the agent's breach of duty (a). If the principal has already recovered from his agent the amount of the bribe, he has, none the less, the cumulative remedy of suing, jointly or severally, the agent, and the person who bribed him, to recover the loss incurred, if any, and in estimating such loss the principal need not deduct the amount of the bribe paid over to him (a). As between the vendor and purchaser, the true price of the thing purchased is, presumably, the amount charged less the amount of the bribe (b). In estimating the damages payable by the agent for accepting secret commission, the latter is treated as a wrong-doer, and the maxim "*Omnia præsumuntur contra spoliatorem*" applies. Consequently, if an agent receive shares or other property, by way of secret commission, he can be compelled, either to return such property to the principal, or to pay the highest value to which it may have reached during the time it was in his—the defaulting agent's—possession, together with interest upon such value from the date when he became possessed of it until the date of the action (c).

The claim of a principal in respect of a bribe received by his agent is barred, both in equity and at common law, after the expiration of six years from the date when the principal became apprised of its receipt (d).

It may be observed that, in cases where an agent receives a bribe, a conclusive presumption arises that such receipt influenced his conduct of his principal's affairs (e); and all contracts made by an agent under the influence of bribery, or otherwise in violation of his duty towards his principal, to the knowledge of the third party, may be repudiated by the principal (f).

(z) *Andrews v. Ramsay*, [1903] 2 K. B. 635; cf. *Price v. Metropolitan House Investment Co.*, (1907) 23 T. L. R. 630.

(a) *Mayor of Salford v. Lever*, [1891] 1 Q. B. 168; cf. *Morgan v. Elford*, (1877) 4 Ch. D. 352; *Cohen v. Kuschke*, (1900) 83 L. T. 102; *Hovenden v. Millhoff*, (1900) 83 L. T. 41.

(b) *Cohen v. Kuschke*, *ubi supra*; *Hovenden v. Millhoff*, *ubi supra*.

(c) *Nant-y-glo Ironworks Co. v. Grave*, (1878) 12 Ch. D. 738; *Eden v. Ridsdale's Lamp Co.*, (1889) 58 L. J. Q. B. 579; *Mitcalfe's Case*, (1879) 13 Ch. D. 169; cf. *De Ruigne's Case*, (1877) 5 Ch. D. 306.

(d) *Metropolitan Bank v. Heiron*, (1880) 5 Ex. D. 319.

(e) *Hovenden v. Millhoff*, (1900) 83 L. T. 41; cf. *Shipway v. Broadwood*, [1899] 1 Q. B. 369; cf., however, *Rowland v. Chapman*, (1901) 17 T. L. R. 669.

(f) *Smith v. Sorby*, (1875) 3 Q. B. D. 552; *Bartram v. Lloyd*, (1904) 90 L. T. 357; *Shipway v. Broadwood*, *ubi supra*; cf., however, *Rowland v. Chapman*, *ubi supra*.

Necessity for agent's bona fides.

Similarly an agent cannot, as such, enter into any transaction in which he has a personal interest in conflict with his duty to his principal without the latter's full consent (*g*). Therefore, if an agent buys or sells property, on his principal's behalf, from or to himself, or himself jointly, the principal, upon discovering, the facts, may rescind the transaction or affirm it and claim the profit made by the agent (*h*).

Action by Agent against Principal.

Actions by an agent against his principal may be divided into two classes—(1) for remuneration; (2) for reimbursement or indemnity.

Remuneration.

The remuneration of an agent may be provided for by an express contract, or it may be implied from the custom or usage of the business in which he is employed (*i*). If no particular custom prevails, the agent is entitled, in the absence of any express contract, to allege an implied contract for the payment of reasonable remuneration (*k*). In the case of a barrister, however, no implication of a right to payment for his services can arise, and in fact a promise to pay him is not actionable (*l*).

Furthermore, service by any agent, however long continued, will not create an implied right to remuneration, unless the circumstances are such as to indicate an understanding between the parties that there should be remuneration (*m*).

Where an agent is to be remunerated by the payment of a commission, he cannot, as a general rule, claim such commission, unless, in the first place, an actual transaction on his principal's behalf results (*n*), and, in the second place, such transaction results directly through the agent's intervention or efforts (*o*).

But where the remuneration of an agent is payable upon the performance by him of a definite undertaking, irrespective of the result which may accrue to the principal, the agent may, under

(*g*) Cf. *Parker v. McKenna*, (1874) L. R. 10 Ch. 96.

(*h*) *Rothschild v. Brookman*, (1831) 5 Bligh, N. S. 165; *Benson v. Heathorn*, (1842) 1 Y. & C. C. 326; *Bentley v. Craven*, (1853) 18 Beav. 75; *Waddell v. Blockey*, (1879) 4 Q. B. D. 678; *Erskine v. Sachs*, [1901] 2 K. B. 504; cf. *In re Cape Breton Co.*, (1884) 26 Ch. D. 221; 29 Ch. D. 795; *Cavendish Bentinck v. Fenn*, (1887) 12 App. Cas. 652; *Ladywell Mining Co. v. Brookes*, (1887) 35 Ch. D. 400.

(*i*) Cf. *Read v. Rann*, (1830) 10 B. & C. 438; *Turner v. Reeve*, (1901) 17 T. L. R. 592.

(*k*) Cf. *Bryant v. Flight*, (1839) 5 M. & W. 114; *Taylor v. Brewer*, (1813) 1 M. & S. 290; *Reeve v. Reeve*, (1858) 1 F. & F. 280.

(*l*) *Kennedy v. Broun*, (1863) 13 C. B. N. S. 677.

(*m*) *Reeve v. Reeve*, *ubi supra*; cf. *Foord v. Morley*, (1859) 1 F. & F. 496; *Hulse v. Hulse*, (1856) 17 C. B. 711; *Taylor v. Brewer*, *ubi supra*.

(*n*) *Read v. Rann*, (1830) 10 B. & C. 438; *Simpson v. Lamb*, (1856) 17 C. B. 603, at p. 616; cf. *Alder v. Boyle*, (1847) 4 C. B. 635.

(*o*) *Mansell v. Clements*, (1874) L. R. 9 C. P. 139; cf. *Bray v. Chandler*, (1856) 18 C. B. 718; *Jeffrey v. Crawford*, (1890) 7 T. L. R. 618; *Robey v. Arnold*, (1897) 14 T. L. R. 39.

proper circumstances, recover his commission, although his principal has derived no benefit from his services (*p*).

If an agent has incurred trouble and expense on his principal's behalf, but is prevented from concluding a transaction and thus earning his commission by a revocation of his authority by his principal, the agent cannot, in the absence of a special agreement, claim reimbursement from his principal in the case of house or shipbroking agencies. The general rule applicable may be said to be that, where an agent's authority is lawfully determined prior to the complete execution of his agency, the question whether the agent is entitled to any, and if so to what, remuneration depends upon the nature and particular terms of his employment and the custom of the particular employment in which he is engaged (*q*).

Reimbursement or indemnity.

On the other hand, every agent has ordinarily an implied right to be indemnified against all losses and liabilities and to be reimbursed in respect of all expenses incurred by him in the execution of his agency (*r*), provided that the indemnity claimed is not in respect of an act which is either unauthorised (*s*), or illegal to the knowledge of the agent (*t*), or negligent, or otherwise of a defaulting nature (*u*).

Where the agent is authorised to act at a particular market or place, the principal's liability to reimburse his agent may be regulated by the reasonable regulations or customs obtaining at such market or place (*x*).

Similarly, an agent, who is sued for money due to his principal, has a right to set off the amount of any losses, liabilities, or expenses, incurred on his principal's behalf, in the proper course of his agency (*y*).

(*p*) *Fisher v. Drewett*, (1878) 48 L. J. Ex. 32; *Fuller v. Eames*, (1892) 8 T. L. R. 278; cf. *Alder v. Boyle*, (1847) 4 C. B. 635; *Henry v. Gregory*, (1905) 22 T. L. R. 53.

(*q*) Cf. *Simpson v. Lamb*, (1856) 17 C. B. 603; *Campanari v. Woodburn*, (1854) 15 C. B. 400, at p. 409; *Warlow v. Harrison*, (1858) 1 El. & El. 295, at p. 317; *Queen of Spain v. Parr*, (1868) 39 L. J. Ch. 73; *Noah v. Owen*, (1886) 2 T. L. R. 364; cf., also, *Taplin v. Florence*, (1851) 10 C. B. 744.

(*r*) *Pawle v. Gunn*, (1838) 4 Bing. N. C. 445; *Pettman v. Keble*, (1850) 9 C. B. 701; *Lacey v. Hill, Crowley's Claim*, (1870) L. R. 18 Eq. 182; *Thacker v. Hardy*, (1878) 4 Q. B. D. 685; *Campbell v. Larkworthy*, (1894) 9 T. L. R. 528.

(*s*) Cf. *Frizione v. Tagliaferro*, (1856) 10 Moo. P. C. 175; *Loring v. Davis*, (1886) 32 Ch. D. 625; *Ellis v. Pond*, [1898] 1 Q. B. 426.

(*t*) *Ex parte Mather*, (1797) 3 Ves. 373; *Josephs v. Pebrer*, (1825) 3 B. & C. 639; *Tatam v. Reeve*, [1893] 1 Q. B. 44; cf. *Adamson v. Jarvis*, (1827) 4 Bing. 66.

(*u*) *Duncan v. Hill*, (1873) L. R. 8 Ex. 242; *Allen v. Wingrove*, (1901) 17 T. L. R. 261; cf. *Haas v. Durant*, [1900] 1 Ch. 209; *Halbronn v. International Horse Agency*, [1903] 1 K. B. 270.

(*x*) *Chapman v. Shepherd*, (1867) L. R. 2 C. P. 228; *Benjamin v. Barnett*, (1903) 19 T. L. R. 564; *Davis v. Howard*, (1890) 24 Q. B. D. 691; cf. *Seymour v. Bridge*, (1885) 14 Q. B. D. 460; *Perry v. Barnett*, (1885) 15 Q. B. D. 388.

(*y*) *Curtis v. Barclay*, (1826) 5 B. & C. 141; cf. *Cropper v. Cook*, (1868) L. R. 3 C. P. 194.

SECTION II.

Executors and Administrators.

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Introductory. An executor derives his title from the will of a deceased person, and the property of the deceased vests in him from the date of the deceased's death (*z*). Probate merely constitutes evidence of the executor's right (*a*), and the rights of an executor are as complete before probate, except with regard to his power to sue, as afterwards (*b*).

An administrator is in the same position, and has the same powers, for all practical purposes, as an executor, except that he derives his title from the court, and has no title at all until letters of administration are granted to him; the property of the deceased only vests in him from the date of the granting of letters of administration (*c*), although, for certain particular purposes, the letters of administration may relate back to the date of the intestate's death (*d*).

The whole of the personal estate of the deceased vests in the executor or administrator, and in the case of testators or intestates whose deaths occur, or have occurred, subsequent to 1897—the date of the Land Transfer Act—the real estate also vests in them, with the exception of land of copyhold tenure, or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant, in which case such real estate vests in the heir.

Actions by Executors or Administrators.

Common law principle.

Tort.—At common law no action in tort is maintainable by an executor for injury done either to the person or property of the deceased, but this rule has been considerably modified by statute.

4 Edw. 3, c. 7.

It is provided by statute 4 Edw. 3, c. 7, that where any trespass has been done to a testator, as of the goods and chattels of the said testator carried away in their life, the executors in such case shall have an action against the trespasser and recover damages in like manner as they whose executors they be should have had if they were living. This statutory remedy was extended by 25 Edw. 3, c. 5, to the executors of executors, and by an equitable

(*z*) *Woolley v. Clark*, (1822) 5 B. & Ald. 744.

(*a*) *Smith v. Milles*, (1786) 1 T. R. 475, at p. 480.

(*b*) Cf. *Wankford v. Wankford*, (1698) 1 Salk. 299, at p. 301.

(*c*) *Woolley v. Clark*, *ubi supra*.

(*d*) Cf. *Tharpe v. Stallwood*, (1843) 12 L. J. N. S. (C. P.) 241; *Morgan v. Thomas*, (1853) 17 Jur. 283; 3 & 4 Will. 4, c. 27, s. 6.

construction of the first-mentioned statute it has been held applicable to administrators(*e*). But this statutory remedy does not extend to injuries inflicted upon the person or the real property of the deceased(*e*).

Furthermore, even in cases where, by the death of the plaintiff or the defendant, the cause of action ceases to exist, the court may, in the exercise of its discretionary jurisdiction, order money paid into court by the defendant to be paid out to the plaintiff(*f*), or the plaintiff's personal representatives(*g*), upon such grounds being shown as would have sufficed had the cause of action still been in existence.

Money paid into court.

Again, although, as mentioned above, an action for defamation, or assault, or other tort of a strictly personal kind, cannot be maintained after the death of the plaintiff, a wrong which inflicts damage upon the plaintiff's personal estate, *e.g.*, slander of title, or, conceivably, breach of promise of marriage, may remain actionable by the plaintiff's executors(*h*).

Damage to estate.

But, since the gist of such an action is the damage done to the personal estate of the deceased, it follows that the measure of damages recoverable is limited to the actual damage inflicted, and nothing can be awarded by way of exemplary damages(*i*).

Measure of damages.

It is provided by statute 3 & 4 Will. 4, c. 42, s. 2, that an action of trespass may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person committed within six calendar months before the death of such person, provided the action be brought within one year of his death. The section further provides that the damages, when recovered, shall form part of the personal estate(*k*).

3 & 4 Will. 4, c. 42.

If the injury to the real estate consist of severing part of the real estate, *e.g.*, trees or corn, and then carrying the severed material away, it would appear that the executor may sue in respect of the wrongful removal of the severed chattel by virtue of statute 4 Edw. 3, c. 7, referred to above, without reference to the limitations of time imposed by statute 3 & 4 Will. 4, c. 42(*l*).

The Fatal Accidents Act, 1846(*m*), enables executors or administrators to sue for damages, under certain conditions, on behalf of the wife, husband, parent, or child of a deceased person, whose death has been caused by the wrongful act, neglect, or default of the defendant. The effect and purport of this

Fatal Accidents Act, 1846.

(*e*) Cf. *Twycross v. Grant*, (1878) 4 C. P. D. 40; *Pulling v. G. E. Ry. Co.*, (1882) 9 Q. B. D. 110; *Hatchard v. Mege*, (1887) 18 Q. B. D. 771.

(*f*) *Brown v. Feeney*, [1906] 1 K. B. 563.

(*g*) *Maxwell v. Wolseley*, [1907] 1 K. B. 274.

(*h*) *Hatchard v. Mege*, *ubi supra*; cf. *Finlay v. Chirney*, (1888) 20 Q. B. D. 494; cf., however, *Pulling v. G. E. Ry. Co.*, (1882) 9 Q. B. D. 110.

(*i*) Cf. *Lockier v. Paterson*, (1844) 1 C. & K. 271.

(*k*) Cf. *Noble v. Cass*, (1828) 2 Sim. 343.

(*l*) Cf. *Williams v. Breedon*. (1798) 1 B. & P. 329.

(*m*) 9 & 10 Vict. c. 93.

important Act, as modified and extended by certain later statutes, have been fully dealt with in a previous chapter (*n*).

Workmen's
Compensation
Act, 1906.

Furthermore, the Workmen's Compensation Act, 1906 (*o*), which has also been dealt with in a previous chapter (*p*), gives certain rights to executors and administrators to sue for compensation payable by employers in respect of deceased workmen. The compensation is payable for the benefit of the dependants, or, if none exist, for the reimbursement of funeral and medical expenses.

If a claim is made by a sole dependant, who himself dies before any award is made in respect of the claim, the right to compensation survives and passes to the legal personal representative of the deceased dependant (*q*).

Contract.—Executors and administrators have much more ample powers to sue in contract than in tort, and if an executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied contract, he can maintain an action at common law to recover such damage, although the action is, in some respect, founded upon tort (*r*).

Thus, although an action is not maintainable for tortious injury to the person of a deceased, causing loss of wages and an incurring of medical expenses (*s*), damages in respect of such form of loss can be recovered by an executor in an action based upon breach of contract, *e.g.*, in an action for failing to safely carry the deceased as a passenger (*t*).

General
powers of
executors.

In fact, an executor may sue in respect of a right of action vested in the deceased based upon any obligation, contract, debt, covenant, or other duty, including even a mere statutory duty (*x*).

The right of action passes, in such cases, to the personal representative, even though no mention of him be made in the contract itself (*y*).

In fact, wherever the damage resulting from the defendant's breach of contract constitutes an injury to the personal estate of the deceased, the executor may sue in respect of it, even though the contract relates, in terms, to real estate (*z*).

Contracts of
personal
service.

But no right of action accrues to an executor, at a date

(*n*) *Vide supra*, p. 238.

(*o*) 6 Edw. 7, c. 58.

(*p*) *Vide supra*, p. 246.

(*q*) *Darlington v. Roscoe & Sons*, [1907] 1 K. B. 219.

(*r*) *Alton v. Midland Ry. Co.*, (1865) 19 C. B. N. S. 213, *per* Willes, J., at pp. 242 and 243; *cf. Knights v. Quarles*, (1820) 2 Br. & B. 102.

(*s*) *Pulling v. G. E. Ry. Co.*, (1882) 9 Q. B. D. 110.

(*t*) *Bradshaw v. L. & Y. Ry. Co.*, (1875) L. R. 10 C. P. 189; *Leggott v. G. N. Ry. Co.*, (1876) 1 Q. B. D. 599; *The Greta Holme*, [1897] A. C. 596, *per* Lord Halsbury, at p. 601; *cf. Potter v. Metropolitan District Ry. Co.*, (1874) 30 L. T. 765.

(*x*) *Cf. Peebles v. Oswaldtwistle U. D. C.*, [1896] 2 Q. B. 159.

(*y*) *Williams on Executors* (10th ed.), at p. 605.

(*z*) *Orme v. Broughton*, (1834) 10 Bing. 533; *Raymond v. Fitch*, (1835) 2 C. M. & R. 588; *Ricketts v. Weaver*, (1844) 12 M. & W. 718.

subsequent to the death of the testator, for breach of a contract of personal service, or one in which the nature of the contract is essentially governed by personal considerations. Such contracts cease to exist after the testator's death, but causes of action which accrued prior to his death may be sued upon by the executor (*a*).

Furthermore, an executor cannot sue in respect of a breach of covenant relating to realty, if the covenant is one which runs with the land, and is not merely collateral (*b*). Covenants.

In the case of such form of covenant, the right of action for breach of it passes to the heir, even though the heir be not named, and even though the covenant be made with the covenantee and his executors (*b*), and even though the covenantee be not made a party to the deed of covenant (*c*).

But it is to be observed that, if the ultimate damage arising from the breach of such a covenant is wholly sustained in the testator's lifetime, so that the effect of a judgment obtained by the executor would not prejudice the rights of the heir, the executor may sue (*d*). Consequently, it may be a crucial point to determine whether a breach of the particular covenant sued upon is of a continuing or single character (*e*).

Under the Land Transfer Act, 1897, the personal representative of a deceased owner of real estate—as defined by section 1 of the Act—is the only person capable of suing upon covenants relating to such real estate, until assent or conveyance to the heir or devisee under section 3 (1) of the Act. Land Transfer Act, 1897.

If, however, the personal representative sue upon a cause of action which, but for this Act, would have vested in the heir, the latter is, of course, entitled to any benefit resulting.

Actions against Executors or Administrators.

An executor or administrator may be sued, either in his representative capacity for acts of the deceased, in which case his liability will not, as a rule, exceed the extent of the assets, or he may be sued as an individual, in tort or contract, for acts done by him in the administration of the estate, in which case his liability will, speaking generally, not be limited by the

(*a*) *Campanari v. Woodburn*, (1854) 15 C. B. 400; *Farrow v. Wilson*, (1869) L. R. 4 C. P. 744, 746; cf. *Marshall v. Broadhurst*, (1831) 1 Tyrwh. 348, at p. 349; also 10 A. & E. at p. 45.

(*b*) *Vide* Williams on Executors (10th ed.), at p. 619; cf. *Dewar v. Goodman*, [1907] 1 K. B. 612; [1908] 1 K. B. 94; cf. also *King v. Jones*, (1814) 5 Taunt. 418; (1815) 4 M. & S. 188; *Kingdon v. Nottle*, (1813) 1 M. & S. 355; (1815) 4 M. & S. 53.

(*c*) Cf. *Forster v. Elvet Colliery Co.*, [1908] 1 K. B. 629.

(*d*) *Kingdon v. Nottle*, *ubi supra*, per Lord Ellenborough, at pp. 363 and 364; *Lucy v. Levington*, (1683) 2 Lev. 26; cf. *King v. Jones*, *ubi supra*.

(*e*) Cf. *Turner v. Moon*, [1901] 2 Ch. 825, at p. 828; cf. also *Spoor v. Green*, (1874) L. R. 9 Ex. 99, at pp. 110, 111, 117; *Kingdon v. Nottle*, *ubi supra*; *King v. Jones*, *ubi supra*.

amount of the assets, though he may, or may not, be entitled to an indemnity out of such assets.

Common law principle.

Liability for Torts of Deceased.—At common law no action in tort can be brought against an executor or administrator for torts committed by a deceased person. But, if the tortious act of the deceased has resulted in the appropriation to his estate of property, or the proceeds or value of property, belonging to another, the executor may be sued for the property, or the amount by which the deceased's estate has benefited (*f*).

Recovery of property.

In such cases the action is, in substance, one for the recovery of property. Consequently, where there is nothing among the assets of the deceased that in law, or in equity, belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued, merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby (*g*).

In short, for the maintenance of an action of this kind, it must be possible to trace the property, or proceeds, by which the estate of the deceased has benefited, into his assets, and in some degree to "earmark" such property or proceeds.

Incumbents.

There is one exception to the above common law rule, which depends merely upon an anomalous custom, namely, that an action for dilapidation will lie against the executor of a deceased incumbent (*h*).

Tort based on contract.

Furthermore, the cause of action does not lapse with the death of the wrong-doer, in cases where the act complained of arises from a failure on the part of the deceased to fulfil a duty of care imposed upon him by contract (*i*), or to perform a quasi-contractual duty (*k*).

3 & 4 Will. 4, c. 42.

The maxim "*Actio personalis moritur cum persona*" has been modified by the statute 3 & 4 Will. 4, c. 42, which has already been referred to (*l*). Section 2 of that statute provides that an action of trespass may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within

(*f*) Cf. *Phillips v. Homfray*, (1883) 24 Ch. D. 439; *Powell v. Rees*, (1837) 7 A. & E. 426.

(*g*) *Phillips v. Homfray*, *ubi supra*, per Bowen, L.J., at pp. 454 and 455; cf. *Kirk v. Todd*, (1882) 21 Ch. D. 484; *Re Duncan*, [1899] 1 Ch. 387; *Daveren v. Wootton*, [1900] 1 Ir. R. 273.

(*h*) Cf. *Wise v. Metcalfe*, (1829) 10 B. & C. 299; *Bunbury v. Hewson*, (1849) 3 Ex. 558.

(*i*) *Blyth v. Fladgate*, [1891] 1 Ch. 337; *Davies v. Hood*, (1903) 19 T. L. R. 158.

(*k*) *Concha v. Murrieta*, (1889) 40 Ch. D. 543, at p. 553; cf. *Grayburn v. Clarkson*, (1868) L. R. 3 Ch. 605; *Shepherd v. Bray*, [1906] 2 Ch. 235; [1907] 2 Ch. 571.

(*l*) *Vide supra*, p. 281.

six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person (*m*).

The measure of damages recoverable, in actions brought against executors for torts committed by deceased persons, is limited—as it is in the case of actions brought by executors—to the extent of the damage or loss inflicted upon the estate (*n*). Vindictive damages cannot be recovered (*n*).

Measure of damages.

Liability of Executor for Contracts of Deceased.—Personal claims, such as are founded upon any obligation, contract, debt, covenant, or other duty on which the testator or intestate might have been sued in his lifetime, survive his death and are enforceable against his executor or administrator (*o*).

Common law principle.

The above common law rule has been fortified by the express provision of statute 3 & 4 Will. 4, c. 42, s. 14, which declares that “an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.”

3 & 4 Will. 4, c. 42, s. 14.

But this rule is subject to the exception referred to in connection with actions on contracts brought by executors (*p*), namely, that no action can be maintained against an executor for breach of a contract of personal service, or one in which the nature of the contract is essentially governed by personal considerations (*q*). In the case of contracts of this kind, if a cause of action arose prior to the death of the deceased, such action may be pursued against the executor; but no fresh liability can arise after the date of such death, since the contracts *ipso facto* cease, thereupon, to exist (*q*).

Contracts of personal service.

Claims by, or against, an executor or administrator, as such, may be joined with claims by or against him personally, provided the latter are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sued or is sued as executor or administrator (*r*). But, if a plaintiff sues personally, a counterclaim cannot be raised against him personally and as an executor (*s*).

Joinder of causes of action.

Liability of Executor for Contracts entered into by himself.—The only cases in which an executor or administrator, if sued upon a contract or promise made by him, can limit his liability

Extent of executor's liability.

(*m*) Cf. *Woodhouse v. Walker*, (1850) 5 Q. B. D. 404.

(*n*) Cf. *Finlay v. Chirney*, (1888) 20 Q. B. D. 494, at p. 507.

(*o*) Williams on Executors (10th ed.), at p. 1346; *vide supra*, p. 282; cf. *Lloyd's v. Harper*, (1880) 16 Ch. D. 290; *Batthyany v. Walford*, (1887) 36 Ch. D. 269, at p. 279.

(*p*) *Vide supra*, pp. 282, 283.

(*q*) Cf. *Marshall v. Broadhurst*, (1831) 1 Tyrwh. 348, at p. 349; *Campanari v. Woodburn*, (1854) 15 C. B. 400; *Farrow v. Wilson*, (1869) L. R. 4 C. P. 744, 746; *Re Parkin*, [1892] 3 Ch. 510; cf., also, 10 A. & E. at p. 45.

(*r*) R. S. C., Ord. XVIII., r. 5.

(*s*) *Macdonald v. Carrington*, (1878) 4 C. P. D. 28.

to the extent of the assets in his hands, so that judgment can only issue against him in his representative capacity to the extent of such assets, are where the consideration, for the promise of the executor or administrator, was a transaction or contract with the testator or intestate. Thus, in an action upon an account stated between the plaintiff and the defendant as executor; in which it was alleged that the defendant had promised to pay to the plaintiff certain sums in consideration of services rendered to the testator, the judgment was held to issue only *de bonis testatoris* (t). Subject to the above class of exception, where the executor is sued on his own contract, it does not affect his liability whether he contracted in his representative capacity or not, or whether the testator left any assets at all (u). The executor cannot plead *plene administravit*, and the judgment obtained against him issues *de bonis propriis* (u).

Funeral
expenses.

Therefore, an executor who himself gives orders with regard to the funeral of the testator, or ratifies the acts of another person who has given such orders, makes himself liable for the expenses incurred, whether there be assets or not (x). But the executor is entitled to retain, out of the assets, reasonable expenses for burial according to the testator's condition in life (y).

It would appear that, in the absence of evidence to charge any other individual, an executor *with assets* is personally liable, without any express contract being entered into by him, for the funeral expenses of his testator suitable to his condition in life (z).

Carrying on
of deceased's
business.

Executors are entitled to carry on the business of their testator for such reasonable time as is necessary to enable them to sell the business property as a going concern, and are entitled, even as against the testator's creditors, to an indemnity in respect of the liabilities properly incurred in so doing (a).

But, none the less, an executor who carries on his testator's business makes himself personally liable for all debts contracted by him in so doing, and judgment will issue against him *de bonis propriis* (b). If the executor carries the business on, not for the

(t) *Powell v. Graham*, (1817) 7 Taunt. 580; cf. *Segar v. Atkinson*, (1789) 1 H. Bl. 102; *Dowse v. Coxe*, (1825) 3 Bing. 20; *Biddell v. Dowse*, (1827) 6 B. & C. 255; *Ashby v. Ashby*, (1827) 7 B. & C. 444, at pp. 448 and 451; cf., also, *Corner v. Shew*, (1838) 3 M. & W. 350.

(u) *Williams on Executors* (10th ed.), at pp. 1416, 1423; cf. *Rose v. Bowler*, (1789) 1 H. Bl. 108; *Corner v. Shew*, (1838) 3 M. & W. 350; *Labouchere v. Tupper*, (1857) 11 Moo. P. C. 198, 221.

(x) *Brice v. Wilson*, (1834) 8 A. & E. 349, n.

(y) *Hancock v. Podmore*, (1830) 1 B. & Ad. 260.

(z) *Williams on Executors* (10th ed.), at pp. 1426 and 1427; *Hancock v. Podmore*, *ubi supra*, per Bayley, J., at p. 262; *Corner v. Shew*, *ubi supra*, at p. 356; *Rogers v. Price*, (1829) 3 Y. & J. 28; *Green v. Salmon*, (1838) 8 A. & E. 348; cf. *Sharp v. Lush*, (1879) 10 Ch. D. 468, at p. 472.

(a) *Dowse v. Gorton*, [1891] A. C. 190, at p. 199.

(b) *Labouchere v. Tupper*, (1857) 11 Moo. P. C. 198, at p. 221.

purpose of selling it as a going concern, and if there is no authority contained in the will to continue the business, he is not entitled to any indemnity (c).

Executors and administrators are empowered by statute (d) to submit to arbitration any debt, account, or other matter relating to the testator's or intestate's estate, without being responsible for any loss occasioned thereby. A reference is usually deemed to constitute a submission both of the cause of action and of the question whether the deceased has left any assets (e). Consequently, if an award be made against the executor, he cannot plead *plene administravit* (f). But the terms of the reference and of the award may, in certain circumstances, protect the executor from personal liability (g). Arbitration.

It is provided by section 4 of the Statute of Frauds that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged or his authorised agent. The written agreement must specify the consideration (h). Statute of Frauds.

An action for arrears of rent, accrued in the lifetime of the testator, must be brought against an executor in his representative capacity, and the judgment will issue *de bonis testatoris* (i). But, if the executor enters upon the demised premises, after the testator's death, the lessor may either sue him as executor, or charge him personally as assignee in respect of the perception of the profits (i). Even if the executor does not enter, he is still chargeable, since he cannot so waive the term as not to be liable for rent so far as he has assets (k). But he will escape all personal liability (l). Recovery of rent.

In an action "for perception of the profits," *i.e.*, for use and occupation, against an executor who has entered upon the demised premises, the executor becomes personally liable and judgment issues *de bonis propriis* (m).

(c) *Re Millard*, (1895) 72 L. T. 823; cf., however, *Hodges v. Hodges*, [1899] 1 Ir. R. 480.

(d) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21 (2).

(e) *Re Wansborough*, (1815) 2 Chitt. Rep. 41.

(f) *Riddell v. Sutton*, (1828) 5 Bing. 200.

(g) Cf. Williams on Executors (10th ed.), at p. 1424; *Worthington v. Barlow*, (1797) 7 T. R. 453; *Love v. Honeybourne*, (1824) 4 D. & Ry. 814.

(h) *Saunders v. Wakefield*, (1821) 4 B. & Ald. 595. *Vide* Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, which, it should be noted, only applies to contracts of suretyship or guaranty.

(i) Williams on Executors (10th ed.), at p. 1388.

(k) *Ibid.* at p. 1390; *Atkins v. Humphrey*, (1846) 2 C. B. 654, at pp. 658 and 659; cf. *Howse v. Webster*, (1608) Yelv. 103.

(l) Cf. *Wollaston v. Hakewill*, (1841) 3 M. & G. 297, at p. 321; *Kearsley v. Orley*, (1864) 2 H. & C. 896, at p. 904; *Rendall v. Andrae*, (1892) 61 L. J. Q. B. 630.

(m) *Wigley v. Ashton*, (1819) 3 B. & Ald. 101; cf. *Atkins v. Humphrey*, (1846) 2 C. B. 654, at pp. 658 and 659.

Nevertheless, where the executor is sued as assign of the lease, for the rent incurred during the time he was in possession, he may plead that the assignment only arises through his executorship, and that the profits yielded by the premises or land are less than the rent and that there are no assets (*n*). In such case, the executor will only be liable for the profits extracted, or capable of being extracted, from the premises or land, by the exercise of reasonable diligence (*o*).

If the executor is sued for rent as executor, and not as assign, he may, by putting forward a proper plea, escape liability beyond the extent of the assets in his hands (*p*), since the consideration for his liability is a transaction with the deceased testator.

Furthermore, if specific performance of a contract to take a lease which has been entered into by the testator be decreed against his executor, the covenants must be framed in such a way as to provide against the latter incurring personal liability (*q*).

Covenant to repair.

An executor, who takes possession of premises leased to his testator, is personally liable for breach of covenant to repair, and cannot limit his liability by pleading that there are no assets and that no profits have been realised (*r*), as he can when sued in respect of rent (*s*).

Limitation of liability.

If an executor is sued upon a cause of action in which the judgment would not issue against him personally *de bonis propriis*, and he has no assets to satisfy the claim, he should not fail to plead *plene administravit* or *plene administravit praeter* (*t*); otherwise, the judgment obtained against him may probably conclude him from denying the existence of assets in his hands sufficient to meet the claim (*t*).

Personal liability.

Liability of Executor for his own Torts.—In so far as an executor or administrator, in the course of administering the deceased's estate, may render himself liable in tort to third parties, his position is similar to that of an ordinary trustee. In other words, judgment will issue against him personally, but he may, or may not, be entitled to an indemnity out of the estate, according to whether he has, or has not, acted in a proper and reasonable manner, in the performance of his

(*n*) Cf. *Re Bowes*, (1887) 37 Ch. D. 128, at p. 131; Williams on Executors (10th ed.), at p. 1391.

(*o*) *Re Bowes*, *ubi supra*, at pp. 131—134; cf. *Whitehead v. Palmer*, [1908] 1 K. B. 151, at pp. 158, 159; cf. also *Rendall v. Andreae*, (1892) 61 L. J. Q. B. 630; *Hopwood v. Whaley*, (1848) 6 C. B. 744; *Horridge v. Wilson*, (1840) 11 A. & E. 645, at p. 655.

(*p*) Williams on Executors (10th ed.), at p. 1393; cf. *Wollaston v. Hakewill*, (1841) 3 M. & G. 297, at p. 321.

(*q*) *Stephens v. Hotham*, (1855) 1 K. & J. 571.

(*r*) *Tremere v. Morison*, (1834) 1 Bing. N. C. 89; *Sleap v. Newman*, (1862) 12 C. B. N. S. 116; *Rendall v. Andreae*, (1892) 61 L. J. Q. B. 630.

(*s*) *Vide supra*, pp. 287, 288.

(*t*) Williams on Executors (10th ed.), at p. 1583.

administration. If he has taken such precautions and exercised such reasonable diligence as an ordinary prudent man would observe in connection with similar affairs of his own, he may claim an indemnity (*u*). Indemnity.

Furthermore, if the executor is entitled to an indemnity out of the estate, the plaintiff is entitled to be subrogated to such right, and can prove directly against the estate for the amount of damages and costs (*x*). Subrogation.

Lastly, mention must be made of claims against an executor which may be made in respect of devastavit. Devastavit.

Devastavit has been defined as "a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets, contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased (*y*)."

Thus, an executor may render himself liable to an action of devastavit by the creditors, or legatees, or persons entitled in the distribution of the assets, if he apply the assets, or a part of them, in the payment of a claim which he is not bound to satisfy (*z*), or if a part of the assets which have come into his possession are lost through his wilful default (*a*).

A devastavit committed by one of several executors does not render the others liable, unless they are actually or constructively parties to the act of devastavit (*b*).

The measure of damages recoverable is the amount by which the sum payable to the plaintiff out of the assets of the estate has been diminished by reason of the devastavit. Measure of damages.

SECTION III.

Trustee in Bankruptcy.

It is provided by the Bankruptcy Act, 1883 (*c*), s. 20, that upon a debtor being adjudicated bankrupt his property shall become divisible among his creditors and vest in a trustee; but Vesting of property in trustee.

(*u*) Cf. *Benett v. Wyndham*, (1862) 4 De G. F. & J. 259; *Speight v. Gaunt*, (1883) 9 App. Cas. 1, at p. 19; *Re Whiteley*, (1886) 33 Ch. D. 347, at p. 355; *Re Raybould*, [1900] 1 Ch. 199.

(*x*) *Re Raybould*, *ubi supra*; cf. *Dowse v. Gorton*, [1891] A. C. 190.

(*y*) *Williams on Executors* (10th ed.), at p. 1434.

(*z*) *Williams on Executors* (10th ed.), at p. 1438; cf. *Midgley v. Midgley*, [1893] 3 Ch. 282.

(*a*) *Job v. Job*, (1877) 6 Ch. D. 562; cf. *Jobson v. Palmer*, [1893] 1 Ch. 71.

(*b*) *Langford v. Gascoyne*, (1805) 11 Ves. 333; *Williams on Executors* (10th ed.) at pp. 1467—1474; cf. *Horton v. Brocklehurst*, (1858) 29 Beav. 504, at p. 510; *Re Gasquoine*, [1894] 1 Ch. 470.

(*c*) 46 & 47 Vict. c. 52.

it is further provided by s. 44 that the bankrupt's tools of trade and his or his family's wearing apparel and bedding up to a total value of 20*l.*, together with all property held by the bankrupt in trust for any other person, shall not become divisible or vest in the trustee.

Causes of
action.
Different
varieties.

Consequently, all the bankrupt's rights of action, whether in tort or contract, in respect of damage to his estate, vest in the trustee (*d*), subject to certain qualifications referred to below. But rights of action in respect of torts or breaches of contract, resulting primarily and immediately in injury wholly to the person or feelings of the bankrupt, do not pass to the trustee for his creditors, even though the estate may thereby have been consequentially damaged (*e*).

Rights of action in respect of torts or breaches of contract, which result primarily and immediately in injuries both to the estate and also to the person or feelings of the bankrupt, would appear to be capable of division, and will pass to the trustee in so far as damage done to the estate is concerned (*f*).

But, where the cause of action is of such a kind that vindictive damages may be awarded to the bankrupt, it would appear that no right of action passes to the trustee, even though the estate be directly affected (*g*).

Basis of
distinction.

In short, where breaches of contract, or torts, result primarily and immediately in damage of one kind only, the right of action to which they give rise cannot be split, even though, in point of fact, consequential damage of another kind has resulted (*h*); though possibly in such a case the trustee and the bankrupt can join as co-plaintiffs; or, possibly, the plaintiff, who has the right of action for the direct damage, can recover in respect of the consequential damage, as trustee for the person or estate consequentially damaged (*i*).

Contracts of
personal
service.

The rights of action in respect of breaches of contracts of hiring or personal service, which are not completely executed at the date

(*d*) Cf. *Hill v. Smith*, (1844) 12 M. & W. 618, at p. 630; *Ashdown v. Ingamells*, (1880) 5 Ex. D. 280; *Howard v. Fanshawe*, [1895] 2 Ch. 581; *Re Perkins*, [1898] 2 Ch. 182.

(*e*) *Howard v. Crowther*, (1841) 8 M. & W. 601; *Beckham v. Drake*, (1849) 2 H. L. C. 579, at pp. 626 and 627; *Stanton v. Collier*, (1854) 23 L. J. Q. B. 116, *per* Wightman, J., at p. 120; *Ex parte Vine*, (1878) 8 Ch. D. 364; *Rose v. Buckett*, [1901] 2 K. B. 449.

(*f*) Cf. *Rogers v. Spence*, (1846) 12 Cl. & F. 700, at pp. 720 and 721; *Beckham v. Drake*, (1849) 2 H. L. C. 579, at pp. 629 and 634; *vide* Williams' Bankruptcy Practice (9th ed.), at p. 226; cf., however, *Knights v. Quarles*, (1820) 2 Br. & B. 102, at p. 104; *Castelli v. Boddington*, (1852) 1 E. & B. 66, *per* Coleridge, J., at p. 72; *Hodgson v. Sidney*, (1866) L. R. 1 Ex. 313, at p. 316.

(*g*) *Howard v. Crowther*, (1841) 8 M. & W. 601; cf. *Clark v. Calvert*, (1819) 8 Taunt. 742; *Brewer v. Dew*, (1843) 11 M. & W. 625.

(*h*) *Rogers v. Spence*, *ubi supra*; *Hodgson v. Sidney*, *ubi supra*; *Morgan v. Steble*, (1872) L. R. 7 Q. B. 611. *Vide supra*.

(*i*) Cf. *Clark v. Calvert*, (1819) 8 Taunt. 742, at p. 754; *Baxendale v. G. E. Ry. Co.*, (1869) L. R. 4 Q. B. 244; *Freeman v. Birch*, (1833) 3 Q. B. 492, n.

of the bankruptcy, or are entered into subsequently to such date remain in the hands of the bankrupt (*k*).

But if there has been a breach of such a contract prior to the date of bankruptcy, the right to sue will vest in the trustee (*l*). Furthermore, even in the case of contracts relating to personal service, or labour to be rendered by the bankrupt, the right to sue for a sum of money agreed to be payable as damages, whether ascertained or not, for breach of such a contract, passes to the trustee (*m*). But the right to sue for wages, in respect of services actually rendered subsequently to his bankruptcy, remains in the hands of the bankrupt (*n*). Wages.

The bankrupt, however, cannot retain, out of his earnings by personal labour or service, any considerable sum so as to exceed the amount required to keep himself and his family (*o*); though if he does so without the trustee claiming it, he possesses rights with respect to it as against strangers (*p*).

In order that the bankrupt may retain the right to sue for money due under a contract of service, he must show that the nature of such contract is strictly personal. If any other element comes within the purview of the contract, *e.g.*, supply of material, the trustee may claim the right to receive or sue for the benefit arising (*q*); as he also may, if the benefit arising cannot properly be termed "earnings" (*r*).

Since the right of a trustee in bankruptcy to sue is based upon the right of the creditors to the possession of the bankrupt's property or estate, it follows that the measure of damages recoverable, in an action brought by the trustee, is limited, subject to what has been said above, to the extent of the loss incurred by the estate or the sum due to the estate, as the case may be (*s*). Measure of damages.

It is to be observed that the Bankruptcy Act, 1883, s. 55, gives to a trustee power, under certain conditions, to disclaim burdensome property or unprofitable contracts pertaining to the bankrupt, but also gives the right to any person injured by the Bankruptcy Act, 1883.
Disclaimer of property.

(*k*) Cf. *Beckham v. Drake*, (1849) 2 H. L. C. 579, at pp. 604 and 643; *Bailey v. Thurston & Co., Ltd.*, [1903] 1 K. B. 137.

(*l*) *Beckham v. Drake*, *ubi supra*.

(*m*) *Beckham v. Drake*, *ubi supra*, at p. 622; cf. *Wadling v. Oliphant*, (1875) 1 Q. B. D. 145.

(*n*) Cf. *Silk v. Osborn*, (1794) 1 Esp. 140; *Beckham v. Drake*, *ubi supra*, at p. 643; *Bailey v. Thurston*, *ubi supra*, at p. 143; *Affleck v. Hammond*, [1912] 3 K. B. 162.

(*o*) 7 East, 57, n.; *In re Graydon*, [1896] 1 Q. B. 417; *In re Roberts*, [1900] 1 Q. B. 122.

(*p*) *Hesse v. Stevenson*, (1803) 3 B. & P. 565, at p. 578.

(*q*) *Crofton v. Poole*, (1830) 1 B. & Ad. 568; *Elliott v. Clayton*, (1851) 16 Q. B. 581.

(*r*) Cf. *In re Graydon*, *ubi supra*; *Shoolbred v. Roberts*, [1899] 2 Q. B. 560, at p. 563.

(*s*) Cf. *Beckham v. Drake*, (1849) 2 H. L. C. 579, at p. 640; *Hill v. Smith*, (1844) 12 M. & W. 618; *Alder v. Keighley*, (1846) 15 M. & W. 117; *Valpy v. Oakley*, (1851) 16 Q. B. 941; *Hodgson v. Sidney*, (1866) L. R. 1 Ex. 313; *Morgan v. Steble*, (1872) L. R. 7 Q. B. 611; *Ashdown v. Ingamells*, (1880) 5 Ex. D. 280.

operation of a disclaimer to be deemed a creditor of the bankrupt to the extent of the injury. The same section further provides that the court may, on the application of any person who is, as against the trustee, entitled to the benefit, or subject to the burden, of a contract made with the bankrupt, make an order rescinding the contract, on such terms as to payment, by or to either party, of damages for the non-performance of the contract, or otherwise, as may seem equitable, and any damages, payable under the order to any such person, may be proved by him as a debt under the bankruptcy.

CHAPTER XII.

Section	I.—Pleading, Proof and Assessment of Damages.
„	II.—Damages in Actions for Injunction and Specific Performance.
„	III.—Recovery of Costs.

SECTION I.

Pleading, Proof and Assessment of Damages.

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Pleading and Proof of Damages.

THE law with regard to the pleading and proof of damages is in a somewhat unsettled state, and it is very difficult to reconcile the different cases, and the statements of the various authorities, which deal with the subject.

Special damage, to be recoverable, must be specially pleaded, in order that the defendant may be duly apprised of the claim which he has to meet (*a*). Any specific loss which has been incurred can, therefore, only be treated at the trial as special damage if it has been specially pleaded (*b*).

Of course, in certain forms of action, *e.g.*, slander not actionable *per se* (*c*), negligence in cases where no absolute duty is imposed (*d*), or irregular distress (*e*), the action is not maintainable without proof of special damage (*a*).

General damage need not be specially pleaded (*f*).

Great diversity of view exists as to the necessity and permissibility of specially pleading matters in aggravation and diminution of damages.

Thus, one authority, in commenting on the leading case of *Millington v. Loring* (*g*), says “the plaintiff is at liberty to plead any matter in aggravation of damages as to which he may give evidence at the trial” (*h*).

(*a*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at p. 528.
 (*b*) *Fleming v. Bank of New Zealand*, [1900] A. C. 577; *cf.* *Evans v. Harries*, (1856) 1 H. & N. 251; *Bodley v. Reynolds*, (1846) 8 Q. B. 779.
 (*c*) *Vide supra*, p. 198.
 (*d*) *Cf. Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, *per* Lord Blackburn, at p. 142.
 (*e*) *Rodgers v. Parker*, (1856) 18 C. B. 112.
 (*f*) *Cf. Goslin v. Corry*, (1844) 7 M. & Gr. 342, *per* Cresswell, J., at p. 347; *Odgers on Pleading and Practice* (6th ed.), at pp. 116 and 196.
 (*g*) (1880) 6 Q. B. D. 190.
 (*h*) *Halsbury's Laws of England*, Vol. 10., at p. 346; *cf. Whitney v. Moignard*, (1890) 24 Q. B. D. 630; *Lumb v. Beaumont*, (1884) 49 L. T. 772, *per* Pearson, J., at p. 774.

The question involved turns upon the proper construction of Ord. XIX., r. 4, R. S. C., which states that "every pleading shall contain, and contain only, a statement . . . of the material facts on which the party pleading relies for his claim or defence," and of Ord. XIX., r. 17, R. S. C., which states that "each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages," and of Ord. XXI., r. 4, R. S. C., which states that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted."

Another authority, in commenting on the case of *Millington v. Loring*, says "it is not strictly necessary for either party to set out in his pleading matters which only affect the amount of damages recoverable, and not the right of action. But it is usual for the plaintiff to plead all such matters in aggravation of damages as would, if proved, entitle the jury to award exemplary or vindictive damages" (i).

Yet another authority, in commenting on the same case, says "the judges did not expressly decide that matters in aggravation of damages could not have been given in evidence at the trial, unless they had been pleaded; though surely that is the logical result of holding that they were material facts" (k).

This last authority also says "the better opinion is that (in spite of the decision in *Millington v. Loring*) matters which merely tend to increase or diminish the amount of damages, and which do not concern the right of action, are strictly not 'material facts' within the meaning of Ord. XIX., r. 4, and therefore ought not to be pleaded. However, the law on the point being somewhat unsettled, a convenient but illogical practice has grown up at chambers, which allows either party to plead such facts according to his pleasure. If you wish to interrogate about them, it is as well to plead them" (l).

In consonance with this view is another statement by the same authority, but in a different work, to the effect that "where it is clear in an action for libel that the action lies without proof of special damage, any loss or injury which the plaintiff has sustained in consequence of the defendant's words, even after action brought, may be proved to support the legal presumption of damage, and to show from what has actually occurred how injurious and mischievous those words were" (m). To this form

(i) Encyclopædia of Laws of England (2nd ed.), Vol. 4, at p. 337; cf. *Phillips v. Phillips*, (1878) 4 Q. B. D. 127, at p. 139.

(k) Odgers on Pleading and Practice (6th ed.), at p. 100; cf. *Bluck v. Lovering*, (1885) 1 T. L. R. 497.

(l) Odgers on Pleading and Practice (6th ed.), at p. 100.

(m) Odgers on Libel and Slander (4th ed.), at p. 364; cf. *Goslin v. Corry*, (1844) 7 M. & Gr. 342, per Cresswell, J., at p. 347; *Ingram v. Lawson*, (1840) 6 Bing. N. C. 212, per Maule, J., at p. 217; cf., however, *Bluck v. Lovering*, (1885) 1 T. L. R. 497. *Vide supra*, pp. 2, 198.

of damage the term "general-special" damage has been applied. And again, the same authority says "if the plaintiff wishes to rely upon the loss of particular customers he must plead such loss specially (either in addition to or without the allegation of a general loss of business); and in that case he must call the customers named as witnesses at the trial. Still, if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff may still recover on the general damage" (n).

Furthermore, there are certain cases which point to the conclusion that a defendant may not plead any matter in mitigation of damages, unless it constitutes a defence (o).

On the other hand, there are other cases which point to a precisely opposite conclusion, and even indicate that, under some circumstances, a defendant not only may, but must, plead, in his defence, such facts in mitigation of damages as he intends to rely upon at the trial (p).

With regard to the particularity of proof required, in actions where special damage is sought to be recovered, the following propositions have been laid down in an important judgment:—
 "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry" (q).

Particularity
of proof.

Thus, in claims for special damage arising through breach of contract, the extent of damage claimed must be specially pleaded; and, in addition, evidence must be forthcoming at the trial to prove that the defendant had some degree of notice that his breach of contract might result in such loss to the plaintiff, and expressly or impliedly accepted responsibility therefor, when he entered into the contract (r).

Failing such proof, the damage will be regarded as too remote, or, in other words, not consequential (r).

(n) *Odgers on Libel and Slander* (4th ed.), at p. 363; cf. *Evans v. Harries*, (1856) 1 H. & N. 251.

(o) *Wood v. Durham (Earl of)*, (1888) 21 Q. B. D. 501; cf. *Wood v. Cox*, (1888) 4 T. L. R. 550; *Wilby v. Elston*, (1849) 8 C. B. 142.

(p) *Scott v. Sampson*, (1882) 8 Q. B. D. 491; cf. *Mangena v. Wright*, (1909) 78 L. J. Q. B. 879, at p. 889; *Bluck v. Lovering*, (1885) 1 T. L. R. 497. *Vide* *The Yearly Practice*, 1910, at p. 220.

(q) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at pp. 532 and 533.
 (r) *Hadley v. Baxendale*, (1854) 9 Exch. 341; *Fletcher v. Tayleur*, (1855) 17 C. B. 21; *Horne v. Midland Ry. Co.*, (1873) L. R. 8 C. P. 131; *Irvine v. Midland*

But it is to be observed that, although the amount of special damage claimed should, as a rule, be specifically stated (*s*), the particularity of proof required to show that the plaintiff is entitled to such sum may vary according to circumstances. (*Vide supra*, pp. 3, 4 and 12.) Thus, in a case of breach of warranty arising out of a sale of goods, the plaintiff may recover as special damage, in appropriate circumstances, the amount of damages which he has been called upon to pay to a sub-purchaser to whom he had resold the goods with an identical warranty (*t*). In such a case strict proof as to the amount of special damage is required.

If, however, the plaintiff, although under a legal liability to compensate his sub-purchaser, has not actually paid away anything at all, he may recover, as special damage, such sum as the jury shall, by its assessment, consider sufficient to meet all future claims which may be made against him (*u*).

It is to be observed that an allegation of a total loss, *e.g.*, under a policy of insurance, does not prevent the recovery of a merely partial loss, if only the latter can be proved (*x*).

In claims for special damage, arising out of tort, the doctrine of notice, as laid down in *Hadley v. Baxendale* (*y*) and later cases, has—strictly speaking—no application (*z*).

But, of course, in actions of tort as in contract the principle of *restitutio in integrum* applies more or less completely (*a*), and, subject to the qualification that the damages must not be too remote, the plaintiff may recover such special damages as the defendant might reasonably have been expected to anticipate would result from his wrongful act (*b*); and, for the purpose of assessing such special damage, evidence as to relevant collateral circumstances and matters may be given, although the figures and amounts named in the course of such evidence do not necessarily fix the amount of the special damage, but may only serve as a guide (*c*).

Great Western Ry. Co., (1880) 6 L. R. Ir. 55; *Agius v. G. W. Colliery Co.*, [1899] 1 Q. B. 413. *Vide supra*, p. 12.

(*s*) Cf. *Martin v. G. E. Ry. Co.*, [1912] 2 K. B. 406, at p. 411; cf., however (in tort), *L. & N. Bank v. George Newnes*, (1900) 16 T. L. R. 433; *Knotts v. Curtis*, (1832) 5 C. & P. 322.

(*t*) Cf. *Hammond v. Bussey*, (1887) 20 Q. B. D. 79; cf., also, *Jackson v. Watson & Sons*, [1909] 2 K. B. 193.

(*u*) *Randall v. Raper*, (1858) E. B. & E. 84; cf. *Dingle v. Hare*, (1859) 7 C. B. N. S. 145, *per* Erle, C.J., at p. 157; cf., also, *Richardson v. Mellish*, (1824) 2 Bing. 229; *Marcus v. Myers*, (1895) 11 T. L. R. 327; *Chaplin v. Hicks*, [1911] 2 K. B. 786, as to vagueness of special damage.

(*x*) *Benson v. Chapman*, (1848) 2 H. L. C. 696; *King v. Walker*, (1863) 33 L. J. Ex. 167.

(*y*) (1854) 9 Exch. 341.

(*z*) Cf. *The Argentino*, (1888) 13 P. D. 191, *per* Bowen, L.J., at p. 201; *France v. Gaudet*, (1871) L. R. 6 Q. B. 199, at pp. 204, 205; *Cobb v. G. W. Ry. Co.*, [1893] 1 Q. B. 459, at p. 464.

(*a*) *The Argentino*, (1888) 13 P. D. 191, at p. 197. *Vide supra*, p. 9.

(*b*) *Sneesby v. L. & Y. Ry. Co.*, (1875) 1 Q. B. D. 42; cf. *Sharp v. Powell*, (1872) L. R. 7 C. P. 253.

(*c*) *Bodley v. Reynolds*, (1846) 8 Q. B. 779; *France v. Gaudet*, (1871) L. R.

Thus, it is necessary to distinguish between special damage and evidence which may be called for the purpose of assessing the amount of special damage incurred (*d*). For instance, in a case of personal injuries caused to the plaintiff by the negligence of the defendant, the plaintiff cannot recover anything at all without proof of some special damage having been incurred (*e*), but such special damage may merely consist of personal disablement without any medical charges being incurred (*f*). It then remains for the jury to assess the amount of pecuniary compensation to be awarded to the plaintiff for such injury, and evidence as to pain and suffering and probable loss of future employment may be given (*g*).

Distinction between special damage and evidence called for the assessment of its amount.

But, of course, in respect of certain claims in tort, duly proved figures and amounts will be conclusive so far as they go—*e.g.*, the amount of medical expenses reasonably incurred in consequence of an injury caused by the defendant's negligence (*h*).

In one case the judges drew a distinction between special damages and special value and seemed to consider that whereas, *e.g.* in a case of conversion, the plaintiff in an action of tort could recover special value without the defendant being apprised of such value at the date of his unlawful act, no special damage over and above such value could be recovered without some degree of notice being fixed upon the defendant (*i*).

The particularity of proof required to sustain a claim for special damage in an action of tort may vary according to circumstances just as it does in actions of contract (*k*).

Thus, in an action for slander not actionable *per se*, an allegation and proof of a general loss of custom will suffice to maintain a claim of special damage (*l*); but, of course, individual customers may be named in the pleadings, in which case the individual loss of each one may, and must, be proved to sustain a claim of particular damage (*m*).

6 Q. B. 199; *The Argentino*, (1888) 13 P. D. 191; (1889) 14 App. Cas. 519; cf. *The Mediana*, [1900] A. C. 113; cf. also *Knotts v. Curtis*, (1832) 5 C. & P. 322.

(*d*) Cf. *The Argentino*, (1888) 13 P. D. 191; *The Mediana*, [1900] A. C. 113.

(*e*) *Dulieu v. White*, [1901] 2 K. B. 669, *per* Kennedy, J., at p. 673; *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127, *per* Lord Blackburn, at p. 142.

(*f*) Cf. *Blake v. Midland Ry. Co.*, (1852) 18 Q. B. 93, *per* Coleridge, J., at p. 111; *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78, at p. 84.

(*g*) *Potter v. Metropolitan Ry. Co.*, (1873) 28 L. T. 735; cf. *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78, at p. 84.

(*h*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78; *Fair v. L. & N. W. Ry. Co.*, (1869) 21 L. T. 326; cf. also, *Davies v. Oswell*, (1837) 7 C. & P. 804.

(*i*) *France v. Gaudet*, (1871) L. R. 6 Q. B. 199, at pp. 204, 205; cf. *Read v. Fairbanks*, (1853) 22 L. J. C. P. 206, *per* Cresswell, J., at p. 208; *Wood v. Bell*, (1856) 25 L. J. Q. B. 148; *The Argentino*, (1888) 13 P. D. 191.

(*k*) *Vide supra*, p. 12, and also p. 296.

(*l*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; cf. *Rose v. Groves*, (1843) 5 M. & Gr. 613.

(*m*) Cf. *Rose v. Groves*, *ubi supra*, at p. 618; *Bluck v. Lovering*, (1885) 1 T. L. R. 497; Odgers on Libel (4th ed.), at p. 363.

Assessment of Damages.

The law relating to the pleading and proof of general and special damages, by means of which the court is enabled to estimate the total amount of damages to be awarded, has just been dealt with.

Function of jury.

The assessment of damages is a matter which, subject to accurate direction by the judge (*n*), it is the exclusive province of the jury to determine (*o*).

Function of judge.

But any question of law relating to damages, *e.g.*, as to remoteness, must be determined by the judge (*p*). Furthermore, of course, in some courts the judge sits both in the capacity of judge and jury, and, in such cases, he may assess damages.

Liquidated damages.

If liquidated damages (*q*) are claimed the amount to be awarded does not lie in the discretion of the court (*r*).

Specified damages.

It is not strictly necessary, in all cases, for the statement of claim to specify the amount of damages claimed (*s*), at all events in those cases where general damages can be awarded, but, if a figure is named, the plaintiff is not entitled to recover a greater sum than that named, without the court first granting leave to amend the claim before judgment is actually entered (*t*).

Certain rules of the Supreme Court have been enacted to provide for the assessment of damages in certain given cases.

Reference.

Thus, it is provided by Ord. XXXVI., rr. 57 and 57A, R. S. C., that in every action or proceeding in the King's Bench Division, in which it shall appear to the court, or a judge, that the amount of damages sought to be recovered is substantially a matter of calculation, the court, or a judge, may direct that the amount for which final judgment is to be entered shall be ascertained by a master or official referee, who may compel the attendance of witnesses and the production of documents, and who shall indorse upon the order of reference the amount of damages found due to the plaintiff, to whom such order shall thereupon be delivered. Upon such delivery, the same proceedings, with regard to entering judgment, taxation of costs, and otherwise, may be taken as upon the finding of a jury upon a writ of inquiry. (*Vide infra*.)

(*n*) *Hadley v. Baxendale*, (1854) 9 Exch. 341, at p. 354; cf. R. S. C., Ord. XXXIX., r. 6.

(*o*) *Bray v. Ford*, [1896] A. C. 44, at p. 52; *Jones v. Hulton*, [1910] A. C. 20, per Lord Loreburn, at p. 25.

(*p*) Cf. *Hobbs v. L. & S. W. Ry. Co.*, (1875) L. R. 10 Q. B. 111, per Blackburn, J., at p. 122; *Hammond v. Bussey*, (1887) 20 Q. B. D. 79, per Lord Esher, M.R., at p. 89.

(*q*) *Vide supra*, p. 4.

(*r*) *Farrant v. Olmius*, (1820) 3 B. & Ald. 692; cf. *Lethbridge v. Mytton*, (1831) 2 B. & Ad. 772; *Hurst v. Hurst*, (1849) 4 Exch. 571.

(*s*) *L. & N. Bank v. George Newnes*, (1900) 16 T. L. R. 433. *Vide supra*, p. 296.

(*t*) Cf. *Beckett v. Beckett*, [1901] P. 85; *Chattell v. Daily Mail Publishing Co.*, (1901) 18 T. L. R. 165; R. S. C., Ord. XXVIII., r. 1.

It is provided by Ord. XXXVI., r. 58, R. S. C., that where damages are to be assessed in respect of any continuing cause of action (*u*), they shall be assessed down to the time of the assessment.

Continuing cause of action.

It is provided by Ord. XIII., r. 5, R. S. C., that where a writ is indorsed with a claim for pecuniary damages only (or for detention of goods), and the defendant fails, or all the defendants, if more than one, fail to appear, the plaintiff may enter interlocutory judgment, and a writ of inquiry shall issue to assess the damages (or the value of the goods) in respect of the causes of action disclosed by the writ. But the court, or a judge, may order a statement of claim or particulars to be filed, before any assessment of damages, and may order that instead of a writ of inquiry the value and amount of damages (or either of them) shall be ascertained in any way which the court, or a judge, may direct, *e.g.*, before a master (*x*), or official referee. (*Vide supra*.)

Writ of inquiry.
Judgment by default.

It is provided by Ord. XIII., r. 6, R. S. C., that where there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may sign interlocutory judgment against such of the defendants as fail to appear, and the value of the goods and the damages (or either of them) may be assessed, as against the defendant or defendants suffering judgment by default, at the same time as the trial of the action against the other defendant or defendants, unless the court, or a judge, otherwise direct.

Judgment by default against certain out of several defendants.

It is to be observed that the effect of this last-mentioned rule is to prevent a plaintiff, who has signed interlocutory judgment against some out of several defendants, from issuing a writ of inquiry as to damages until he has been granted leave under an order upon a summons.

Similar provisions with regard to the assessment of damages in cases where the defendant, or one or more of several defendants, makes, or make, default in delivery of defence, are enacted by Ord. XXVII., rr. 4 and 5.

A writ of inquiry is directed to the sheriff of the county where the action would have been tried, and calls upon him to summon a jury to assess the damages recoverable under the interlocutory judgment.

Assessment of Damages against Two or more Defendants.

Where damages are claimed against two or more defendants, in respect of a joint tort (*y*), the damages cannot be severed—

Judgment issues in tort against all defendants equally.

(*u*) Cf. *Hole v. Chard Union*, [1894] 1 Ch. 293; *De Soysa v. De Pless Pol*, [1912] A. C. 194. *Vide supra*, p. 21, 40.

(*x*) Cf. *MacDonald v. Antelme Paterson & Co.*, [1884] W. N. 72.

(*y*) Cf. *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264; *Walker v. Woolcott*, (1838) 8 C. & P. 352.

judgment must issue for the total sum awarded against each and all of the defendants who are found liable (*z*).

Has this rule
been modi-
fied?

There is, however, possibly some slight doubt as to whether Ord. XVI., rr. 4 and 5, R. S. C., have or have not modified the above well-established rule (*a*), and, in a recent Irish case, the court permitted a segregation of the damages against different defendants, but, in doing so, it drew a distinction between the technical cause of action, which was joint, and the subject-matter or grievance, which varied as between the different defendants in this particular case (*b*).

Vindictive
damages.

Furthermore, in a case of joint tort in which the plaintiff might be able to obtain vindictive damages against one defendant, owing to the latter having acted with express malice, he cannot claim such damages against all the defendants if the others were less culpable (*c*).

Principal and
agent.

It has been laid down that the real injury is the aggregate of the injury received from them all (*d*), and that if the plaintiff desires to get the fullest vindictive damages he should separately sue the chief offender (*e*). Incidentally, it may be observed that a principal is not responsible for the malice of his agent so as to be liable to vindictive damages, though he may be responsible for the wrongful acts committed by his agent who was in fact actuated by malice (*f*).

Law of Libel
Amendment
Act, 1888.

Where actions are brought by a plaintiff against two or more defendants, in respect of libels which, though separate, are substantially the same, and such actions are consolidated in accordance with section 5 of the Law of Libel Amendment Act, 1888 (*g*), the jury may, and ought, to assess the damages separately against the several defendants.

New Trial and Review of Assessment.

Application.

An assessment of damages by a jury under a writ of inquiry is the trial of an action in the High Court within the meaning of the Judicature Act, 1890 (*h*), s. 1, so that an application for a

(*z*) *Eliot v. Allen*, (1845) 1 C. B. 18; *Clark v. Newsam*, (1847) 1 Ex. 131; *Dawson v. McClelland*, [1899] 2 Ir. R. 486; *Damiens v. Modern Society, Ltd.*, (1910) 27 T. L. R. 164; cf., however, *Gregory v. Cotterell*, (1852) 1 E. & B. 360; *O'Keefe v. Walsh*, [1903] 2 Ir. R. 681; R. S. C., Ord. XVI., r. 4.

(*a*) *Vide* The Yearly Practice, 1910, notes to Ord. XVI., r. 4.

(*b*) *O'Keefe v. Walsh*, *ubi supra*.

(*c*) *Clark v. Newsam*, (1847) 1 Ex. 131; cf. *Gregory v. Cotterell*, (1853) 1 E. & B. 360; cf., however, *Wright v. Court*, (1825) 2 C. & P. 232.

(*d*) *Clark v. Newsam*, (1847) 1 Ex. 131, *per* Alderson, B., at p. 140.

(*e*) *Clark v. Newsam*, *ubi supra*, *per* Pollock, C.B., at p. 140.

(*f*) *Carmichael v. Waterford and Limerick Ry. Co.*, (1849) 13 Ir. L. R. 313; *Black v. North British Ry. Co.*, (1908) S. C. 444, *per* the Lord President; cf. *Citizen Life Assurance Co. v. Brown*, [1904] A. C. 423; *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; cf. also *Robertson v. Wylde*, (1838) 2 Moo. & Rob. 101.

(*g*) 51 & 52 Vict. c. 64.

(*h*) 53 & 54 Vict. c. 44.

new trial must be made to the Court of Appeal (*i*); but, in the case of an action tried before an official referee, the application must be made to a Divisional Court (*k*).

It is provided by Ord. XXXIX., r. 6, R. S. C., that a new trial shall not be granted unless, in the opinion of the court to which application is made, some substantial wrong or miscarriage has been occasioned by the alleged impropriety in the first hearing (*l*).

Substantial cause must be shown.

But a new trial may be granted on the ground of excessive damages, if the court is of the opinion that, having regard to all the circumstances of the case, no twelve men could reasonably have awarded such a sum (*m*); and, in a more recent case, it has been laid down that a verdict may be set aside, and a new trial granted, if the court, without imputing perversity to the jury, comes to the conclusion, from the amount of the damages and the other circumstances, that the jury must have taken into consideration irrelevant matters or applied a wrong measure of damages (*n*).

Excessive damages.

Similarly, a new trial may be granted where it is alleged that the damages awarded are insufficient, if the court is satisfied that the jury must have omitted to take into consideration some of the elements of damage (*o*), or have merely arrived at their verdict by compromise (*p*).

Insufficient damages.

In brief, the grounds upon which an application for a new trial may be granted, whether it be alleged that the damages are excessive or inadequate, are, in addition to those just mentioned, actual misconduct on the part of the jury (*q*), legal misdirection on the part of the judge (*r*'), improper admission or rejection of evidence (*s*), or that the verdict is against the weight of evidence (*t*).

Other grounds for new trial.

(*i*) *William Radam's Microbe Killer Co. v. Leather*, [1892] 1 Q. B. 85.

(*k*) *Gower v. Tobitt*, (1891) 39 W. R. 193; *Glasbrook v. Owen*, (1890) 7 T. L. R. 62.

(*l*) *Cf. Bray v. Ford*, [1896] A. C. 44; *Anderson v. Calvert*, (1908) 24 T. L. R. 399; *Floyd v. Gibson*, (1909) 100 L. T. 761.

(*m*) *Praed v. Graham*, (1889) 24 Q. B. D. 53.

(*n*) *Johnston v. G. W. Ry. Co.*, [1904] 2 K. B. 250; cf. *Rowley v. L. & N. W. Ry. Co.*, (1873) L. R. 8 Exch. 221.

(*o*) *Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78; cf. *Springett v. Balls*, (1866) 7 B. & S. 477; *Forsdike v. Stone*, (1868) L. R. 3 C. P. 607; *Armstrong v. Haley*, (1843) 4 Q. B. 917.

(*p*) *Hall v. Poyser*, (1845) 13 M. & W. 600; *Falvey v. Stanford*, (1874) L. R. 10 Q. B. 54; cf., however, *Gibbs v. Tunaley*, (1845) 1 C. B. 640.

(*q*) *Hughes v. Budd*, (1840) 8 Dowl. 315; cf. *Campbell v. Hackney Furnishing Co.*, (1906) 22 T. L. R. 318.

(*r*) *Rendall v. Haywood*, (1839) 5 Bing. N. C. 424; *Forsdike v. Stone*, *ubi supra*; *Knight v. Egerton*, (1852) 7 Exch. 407; cf. *Bray v. Ford*, [1896] A. C. 44; *Anderson v. Calvert*, (1908) 24 T. L. R. 399; *Floyd v. Gibson*, (1909) 100 L. T. 761.

(*s*) *Wright v. Tatham*, (1837) 7 A. & E. 313; cf. *Manley v. Palache*, (1895) 73 L. T. 98; *Evans v. Merthyr U. C.*, [1899] 1 Ch. 241; *Tait v. Beggs*, [1905] 2 Ir. R. 525.

(*t*) *Jones v. Spencer*, (1897) 77 L. T. 536, at p. 538; *Managers of Metropolitan Board v. Hill*, (1882) 47 L. T. 29; *Allcock v. Hall*, [1891] 1 Q. B. 444; cf. *Phillips v. Martin*, (1890) 15 App. Cas. 193; *Council of Brisbane v. Martin*, [1894] A. C. 249.

Reduction of damages without new trial.

It has now been decided that the Court of Appeal cannot, without the consent of both the plaintiff and the defendant, in lieu of ordering a new trial, reduce the damages to such a sum as the court considers reasonable (*u*).

Right to Begin.

How determined.

The right to begin depends upon the party upon whom the proof of the issue is cast in the first instance by the pleadings. But whenever the plaintiff claims unliquidated damages, he has the right to begin, unless the defendant has expressly admitted that the plaintiff is, *prima facie*, entitled to recover the full sum which he claims (*x*).

If the damages claimed be liquidated, the plaintiff has the right to begin, if the defendant in his defence has traversed any material allegation which is essential to the plaintiff's case. Where the issue rests upon the defendant, apart from the question of damages, the defendant will acquire the right to begin if the plaintiff will not undertake to offer proof of substantial damage (*y*).

Duty of judge.

In case of dispute as to the right to begin, the judge decides according to the pleadings as they stand. A defendant cannot make admissions in court which are not on the pleadings in order to acquire the right to begin, unless he obtain leave to amend the pleadings so as to incorporate such admissions (*z*).

New trial.

A new trial may be granted where injury has resulted from an erroneous decision of a judge relative to the order of beginning (*a*), but it will not be granted unless it be clearly shown that such ruling induced manifest and substantial injustice (*b*).

Payment into Court.

Object of payment.

Payment of damages into court is governed by Ord. XXII., rr. 1—22, R. S. C. The object of such payment is to escape liability for costs incurred subsequently to the date of such payment. The payment may be without a denial of liability, or with a denial, except in the case of libel and slander, in which no payment can be made accompanied by a denial of liability.

If money be paid in without a denial of liability, the plaintiff

(*u*) *Watt v. Watt*, [1905] A. C. 115; overruling *Bell v. Lawes*, (1884) 12 Q. B. D. 356.

(*x*) *Carter v. Jones*, (1833) 6 C. & P. 64; *Mercer v. Whall*, (1845) 5 Q. B. 447.

(*y*) *Chapman v. Rawson*, (1846) 8 Q. B. 673.

(*z*) Cf. *Price v. Seaward*, (1841) Car. & M. 23.

(*a*) *Geach v. Ingall*, (1845) 14 M. & W. 95, at p. 99; *Balher v. Brayne*, (1848) 5 C. B. 655.

(*b*) *Edwards v. Matthews*, (1847) 4 D. & L. 721; *Brandford v. Freeman*, (1850) 5 Ex. 734; cf. R. S. C., Ord. XXXIX., r. 6.

may take the money out in complete satisfaction, or he may take it out and proceed for further damages (*c*).

If a defendant, in an action for unliquidated damages, pays money into court with a denial of liability, and the plaintiff proceeds with the action but recovers less than the sum paid into court, or an amount only equal to such sum, the defendant will only be entitled to the subsequent costs on the issue of the amount of damages, and the plaintiff will be entitled to the whole of the costs of the action down to payment in, and the subsequent costs of the issues on which he succeeds—such as liability (*d*).

Incidence of subsequent costs.

The making of an order, under Ord. XXII., r. 6, R. S. C., for payment out of money paid into court by a defendant with a denial of liability, is discretionary, but the presumption is that the amount recovered by the plaintiff should be paid out to him, and it lies on the defendant to rebut that presumption (*e*). The balance, if any, will be repaid to the defendant (*f*).

Discretion of court.

Where money has been paid into court before delivery of defence, and accepted by the plaintiff in satisfaction, within the time limited by Ord. XXII., r. 7, R. S. C., there is no jurisdiction to order the plaintiff to pay the costs of the defendant incurred between the dates of the payment into court and the acceptance (*g*).

Where two defendants are sued on a joint tort, and one defendant pays into court with a denial of liability a sum sufficient to satisfy the plaintiff's claim, such payment does not disentitle the plaintiff to judgment for costs against the other defendant (*h*).

Payment by a joint tort-feasor.

SECTION II.

Damages in Actions for Injunction and Specific Performance.

The Court of Chancery was granted in 1858 express powers to award damages under certain circumstances by the Chancery Amendment Act (*i*), otherwise known as Lord Cairns' Act. Section 2 of this Act provided that in all cases in which the

Lord Cairns' Act, 1858.

(*c*) *Brown v. Feeney*, [1906] 1 K. B. 563, at p. 566.

(*d*) *Powell v. Vickers, Sons and Maxim*, [1907] 1 K. B. 71; cf. *Wagstaffe v. Bentley*, [1902] 1 K. B. 124; *Fitzgerald v. Tilling*, (1907) 96 L. T. 718; *The Blanche*, [1908] P. 259.

(*e*) *Powell v. Vickers, Sons and Maxim*, [1907] 1 K. B. 71.

(*f*) *The Blanche*, [1908] P. 259.

(*g*) *Lomer v. Waters*, [1898] 2 Q. B. 326.

(*h*) *Penny v. Wimbledon U. D. C.*, [1899] 2 Q. B. 72; cf. *Walker v. Woolcott*, (1838) 8 C. & P. 352.

(*i*) 21 & 22 Vict. c. 27, repealed by 46 & 47 Vict. c. 49, which, however, preserves the jurisdiction conferred by the former Act. *Vide Sayers v. Collyer*, (1884) 28 Ch. D. 103.

Court of Chancery, at the date of the Act, had jurisdiction to entertain an application for an injunction against the breach of any covenant, contract, or agreement, as against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it should be lawful for the same court, if it should think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and that such damages might be assessed in such manner as the court should direct.

It is to be observed that this Act, although giving to the court discretionary powers to award damages in lieu of an injunction, does not modify the established principles upon which courts of equity have acted with regard to their jurisdiction in the granting of injunctions (*k*).

Damages for apprehended prospective injury not recoverable at common law.

But this Act as interpreted by the courts has modified in one very important particular, namely, in respect of apprehended prospective injury, the measure of damages which may be given in lieu of an injunction. Thus, in all cases in which damages are awarded, in addition to an injunction, or in lieu of or in addition to specific performance, in respect of past or existing damage or injury, the measure of damages is, it is submitted, the same as in an ordinary common law action for trespass or nuisance or breach of contract (*l*), and it is to be borne in mind that to recover damages under Lord Cairns' Act the plaintiff must first show that, at the date when he commenced his action, he was entitled to some equitable relief of the kind specified in the Act (*m*).

But may be recoverable under Lord Cairns' Act.

But, at common law, no damages can be recovered in respect of apprehended prospective or future damage, or injury, arising from continuing trespass or nuisance or breach of covenant, in cases where such continuance will give rise to *repeated successive causes of action* (*n*). On the other hand, where damages are awarded in lieu of an injunction by which the continuance of an *existing* trespass or nuisance or breach of covenant is sought to be restrained, damages in respect of apprehended prospective injury or damage, as well as in respect of existing damage, may be given by virtue of Lord Cairns' Act (*o*). While, however, it

(*k*) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 315; cf. *Cowper v. Laidler*, [1903] 2 Ch. 337, at p. 339; *Lawrence v. Austin*, (1865) 12 L. T. 757.

(*l*) *Tamplin v. James*, (1880) 15 Ch. D. 215, at p. 223; cf. *Rock Portland Cement Co. v. Wilson*, (1883) 48 L. T. 386.

(*m*) *White v. Boby*, (1877) 26 W. R. 133; *Hipgrave v. Case*, (1885) 28 Ch. D. 356; *Lavery v. Pursell*, (1888) 39 Ch. D. 508; *Proctor v. Bayley*, (1889) 42 Ch. D. 390, at p. 401.

(*n*) Cf. *Darley Main Colliery Co. v. Mitchell*, (1885) 11 App. Cas. 127; *West Leigh Colliery Co. v. Tunncliffe and Hampson, Ltd.*, [1908] A. C. 27.

(*o*) Cf. *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 319;

is true that an injunction will sometimes issue in cases where *no* injury *at all* has actually been inflicted, and where all injury or damage is therefore merely apprehended (*p*), it is very doubtful whether prospective damages in lieu of such an injunction could be given (*q*).

The Judicature Act, 1873 (*r*), has given complete jurisdiction both in law and equity to the courts, so that it is now possible for a court of the King's Bench Division to grant an injunction, and also for a court of equity to give damages for breach of an agreement at common law, although damages might not be recoverable by virtue of Lord Cairns' Act, owing to specific performance of such agreement not being enforceable (*s*).

Judicature Act, 1873.

Furthermore, either under Lord Cairns' Act or probably merely by virtue of the Judicature Act, either court may award damages, under appropriate circumstances, in addition to granting an injunction (*t*) or specific performance (*u*).

Damages in addition to injunction or specific performance.

But it is to be observed that the Judicature Act, 1873, s. 25, sub-s. 11, does not extend equity jurisdiction so as to enable the courts to grant damages in a case wherein damages were not recoverable at common law. Thus, where a defendant can escape liability by pleading the Statute of Frauds, he cannot be made liable in damages by an application of the equitable doctrine of part performance (*x*), though, of course, if part performance would suffice in such a case to entitle the plaintiff to a decree of specific performance, damages could be awarded by virtue of Lord Cairns' Act in substitution for specific performance.

Judicature Act, 1873, not subversive of common law.

Where a court of equity decides to give damages in lieu of or in addition to an injunction or specific performance, an inquiry in chambers may be ordered, for the purpose of assessment (*y*), or the court itself may assess the damages without a separate inquiry (*z*).

Inquiry as to damages.

Where a plaintiff is entitled to sue for liquidated damages for

Liquidated damages and

Cowper v. Laidler, [1903] 2 Ch. 337, at p. 339; *Martin v. Price*, [1894] 1 Ch. 276; *Warren v. Brown*, [1902] 1 K. B. 15, at p. 21.

(*p*) *Cooper v. Whittingham*, (1880) 15 Ch. D. 501, at p. 507; cf. *Att.-Gen. v. Nottingham Corporation*, [1904] 1 Ch. 673.

(*q*) *Dreyfus v. Peruvian Guano Co.*, (1889) 43 Ch. D. 316; *Cowper v. Laidler*, [1903] 2 Ch. 337, at pp. 339 and 340; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 315; cf. *Martin v. Price*, [1894] 1 Ch. 276; *Holland v. Worley*, (1884) 26 Ch. D. 578; *Colls v. Home and Colonial Stores*, [1904] A. C. 179, at p. 193.

(*r*) 36 & 37 Vict. c. 66, ss. 16, 24, and 76.

(*s*) Cf. *Elmore v. Pirrie*, (1887) 57 L. T. 333; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A. C. 293; cf., also, *Tamplin v. James*, (1879) 15 Ch. D. 215.

(*t*) Cf. *Martin v. Price*, [1894] 1 Ch. 276.

(*u*) Cf. *Jones v. Gardiner*, [1902] 1 Ch. 191; *Jaques v. Millar*, (1877) 35 Ch. D. 153; *Royal Bristol, etc. Building Society v. Bomash*, (1887) 35 Ch. D. 390.

(*x*) *Sully's Case*, (1886) 54 L. T. 76; *Lavery v. Pursell*, (1888) 39 Ch. D. 508.

(*y*) Cf. *Wilson v. Northampton, etc. Ry. Co.*, (1874) L. R. 9 Ch. 279.

(*z*) *Cornwall v. Henson*, [1900] 2 Ch. 298.

injunction
not both
recoverable.

breach of an agreement, he cannot obtain both such damages and an injunction (a).

SECTION III.

RECOVERY OF COSTS.

Costs of other
proceedings
may con-
stitute conse-
quential
damage.

In an action for damages, whether arising out of tort or breach of contract, costs reasonably incurred by the plaintiff, in other proceedings necessitated, or brought about, through the defendant's act or default, are not deemed to be too remote a form of damage and are consequently recoverable under proper circumstances.

Thus, in an action for breach of warranty of authority, if the plaintiff has previously sued the alleged principal for breach of contract, and has been compelled to pay the costs of such proceedings, he may recover the amount of such costs, if reasonably incurred, from the defendant, whose wrongful pretence of authority, as agent, entailed the incurring of such costs by the plaintiff (b).

Again, in an action against a coroner for false imprisonment, a plaintiff has been held to be entitled to recover the costs incurred by him in quashing the inquisition under which he was given into custody (c). Similarly in an action against a sheriff's officer for illegal arrest (d).

Relevant
factors.

If the plaintiff, before he brought the proceedings, the costs of which he is endeavouring to recover, was actually apprised, or could with little difficulty have discovered, that such proceedings would be futile, the costs would not be deemed to have been reasonably incurred, and would therefore not be recoverable (e). But, in any case where costs have been necessarily incurred to secure the plaintiff's full rights, there, at least, they may be said to have been reasonably incurred (f).

Costs must be
claimed in
principal
cause of
action.

If a plaintiff has obtained judgment against a defendant for a wrongful act, but has omitted to claim in such action damages in respect of costs incurred by him in proceedings with third parties entailed through the defendant's act, he is estopped from bringing

(a) *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377.

(b) *Collen v. Wright*, (1857) 8 E. & B. 647; *Hughes v. Graeme*, (1864) 33 L. J. Q. B. 335; cf. *Starkey v. Bank of England*, [1903] A. C. 114; *Salvesen & Co. v. Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

(c) *Foxall v. Barnett*, (1853) 2 E. & B. 928; cf., however, *Hodges v. Litchfield (Earl of)*, (1835) 1 Bing. N. C. 492; *Holloway v. Turner*, (1845) 6 Q. B. 928.

(d) *Pritchett v. Boevey*, (1833) 1 Cr. & M. 775.

(e) Cf. *Godwin v. Francis*, (1870) L. R. 5 C. P. 295. *Vide infra*, p. 308.

(f) *Henderson v. Squire*, (1869) L. R. 4 Q. B. 170; cf. *Bramley v. Chesterton*, (1857) 2 C. B. N. S. 592.

a further action for their recovery, since the matter is deemed to be *res judicata* (g).

Where a plaintiff sues two defendants for an alleged joint tort, and recovers judgment against one, but not against the other, the court, if it thinks fit, may direct that the plaintiff's costs recoverable against the unsuccessful defendant shall include the costs he might have to pay to the successful defendant (h).

Alleged joint tort. Payment of successful defendant's costs.

Costs incurred by a plaintiff, who is suing for their recovery, may be recovered whether they were incurred by him, in an action with a third party, as plaintiff, or as defendant. Thus, if a plaintiff has been successfully sued by a third party, and the plaintiff's liability arose through the defendant's breach of contract or other wrongful act, the plaintiff may, under proper circumstances, not only recover from the defendant the damages which he was compelled to pay, but the amount of costs reasonably incurred in defending the suit (i). In the case of breach of contract, claims of this kind may arise, *e.g.*, where goods commonly intended for resale have been sold by the defendant to the plaintiff with a warranty and the plaintiff has resold them (k), or where goods have been sold to the plaintiff by the defendant with due notice that the plaintiff had entered into a sub-contract with a third party (l). If the plaintiff, under these latter circumstances, has unsuccessfully sued the third party for the price of such goods, he may, in proper circumstances, recover the costs of such action (m). (As to recovery of costs by parties to dishonoured bills of exchange, the reader is referred to Ch. 8, *supra*, pp. 191, 192.)

Costs recoverable whether plaintiff was previously a plaintiff or a defendant.

But it would appear that the right to recover the costs of a former action does not extend to the costs of an appeal (n). Furthermore, if the plaintiff was apprised (o), or could with little

Costs of appeal not recoverable.

(g) *Furness, Withy & Co. v. Hall*, (1909) 25 T. L. R. 233.

(h) *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264; *Medley v. London United Tramways, Ltd.*, and *London General Omnibus Co.*, (1910) 26 T. L. R. 315; cf. *Beaumont v. Senior*, [1903] 1 K. B. 282.

(i) *Dixon v. Fawcus*, (1861) 3 E. & E. 537; *Hammond & Co. v. Bussey*, (1887) 20 Q. B. D. 79; *Vogan & Co. v. Oulton*, (1899) 81 L. T. 435; *Agius v. G. W. Colliery Co.*, [1899] 1 Q. B. 413; *Prince of Wales Dry Dock Co. v. Fownes Forge and Engineering Co.*, (1904) 90 L. T. 527; *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316; *The Milwall*, [1905] P. 155; *Bentley Bros. v. Metcalfe & Co.*, [1906] 2 K. B. 548; cf. *Baxendale v. L. C. & Dover Ry. Co.*, (1874) L. R. 10 Exch. 35; *Fisher v. Val de Travers Asphalte Co.*, (1876) 1 C. P. D. 511; *The British Commerce*, (1884) 9 P. D. 128; *Assicurazioni Generali di Trieste v. Empress Assurance Corporation*, [1907] 2 K. B. 815, at p. 821.

(k) *Hammond v. Bussey*, *ubi supra*; cf. *Lewis v. Peake*, (1816) 7 Taunt. 153; *Randall v. Raper*, (1858) E. B. & E. 84.

(l) *Agius v. G. W. Colliery Co.*, *ubi supra*; cf. *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445; *Grébert-Borgnis v. Nugent*, (1885) 15 Q. B. D. 85.

(m) *Munro v. Bennet*, (1911) S. C. 337.

(n) *Vogan v. Oulton*, (1899) 81 L. T. 435; *Maxwell v. British Thomson Houston Co.*, [1904] 2 K. B. 342; *Shepherd v. Bray*, [1906] 2 Ch. 235, at p. 254.

(o) *Short v. Kalloway*, (1839) 11 A. & E. 28; *Godwin v. Francis*, (1870) L. R. 5 C. P. 295; *The Wallsend*, [1907] P. 302.

Nor costs of obviously useless litigation.

difficulty have discovered (*p*), that he had no real defence to the action brought against him by the third party, the costs incurred in defending such action cannot be deemed to have been reasonably incurred, and are therefore too remote to be recovered. But the defendant's assent (*q*), even though tacit (*r*), to the plaintiff's course of action in defending the suit brought against him by the third party will estop him from contending that the costs were not reasonably incurred.

It would also appear that, in certain exceptional circumstances, a plaintiff may possibly recover the costs of defending a hopeless suit, if the main purpose of such defence was the proper ascertainment of the measure of damages (*s*).

Contract of indemnity.

Even where a person is covered by an express contract of indemnity, he is not entitled to incur costs by unreasonably defending an action brought against him, to which he has no real defence (*t*). But, if he acts reasonably, he may recover, under the contract of indemnity, the properly incurred costs of all proceedings brought against him, provided such proceedings were contemplated under the contract of indemnity (*u*).

It would appear that the amount of costs recoverable under a contract of indemnity is the full solicitor and client costs (*x*), but that where the plaintiff is not entitled to an absolute indemnity, but is simply recovering damages, he can only claim party and party costs (*y*). The point is, however, not clearly settled by authority, as appears from reference to the cases cited.

Limited liability of sub-lessee.

In conclusion, it should be noted that whereas, in the case of a conveyance or demise of real property, an express or implied covenant of title gives to the grantee or lessee a right to recover the damages and costs of an action brought against him by a third party who may have an overriding title (*z*), a lessee, on the

(*p*) *Wrightup v. Chamberlain*, (1839) 7 Scott, 598; cf. 10 M. & W., per Parke, B., at p. 255.

(*q*) Cf. *Williams v. Burrell*, (1845) 1 C. B. 402, at pp. 433, 434; *Howes v. Martin*, (1794) 1 Esp. 162.

(*r*) *Blyth v. Smith*, (1843) 5 M. & Gr. 405; *Rolph v. Crouch*, (1867) L. R. 3 Exch. 44.

(*s*) *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316, per Buckley, J., at p. 323; cf., however, *Hammond v. Bussey*, (1887) 20 Q. B. D. 79, per Fry, L.J., at pp. 101 and 102.

(*t*) *Knight v. Hughes*, (1828) Moo. & M. 247; *Gillet v. Rippon*, (1829) Moo. & M. 406; cf. *Walker v. Hatton*, (1842) 10 M. & W. 249.

(*u*) *Duffield v. Scott*, (1789) 3 T. R. 374; *Jones v. Williams*, (1841) 7 M. & W. 493; *Penley v. Watts*, (1841) 7 M. & W. 601, per Parke, B., at p. 609; *Ibbett v. De la Salle*, (1860) 6 H. & N. 233; *Gooch v. Clutterbuck*, [1899] 2 Q. B. 148; *The Millwall*, [1905] P. 155.

(*x*) *Smith v. Compton*, (1832) 3 B. & Ad. 407; *Howard v. Lovegrove*, (1870) L. R. 6 Ex. 43; *Scott v. Foley*, (1899) 16 T. L. R. 55; *Barnett v. Eccles Corporation*, [1900] 2 Q. B. 423, at p. 428; *Born v. Turner*, [1900] 2 Ch. 211; cf., however, *Maxwell v. British Thomson Houston Co.*, [1904] 2 K. B. 342.

(*y*) *Barnett v. Eccles Corporation*, [1900] 2 Q. B. 423, at p. 428; *G. W. Ry. Co. v. Fisher*, [1905] 1 Ch. 316, at p. 324; cf. *Agius v. G. W. Colliery Co.*, [1899] 1 Q. B. 413; cf., also, *Smith v. Compton*, *ubi supra*.

(*z*) Cf. *Smith v. Compton*, *ubi supra*; *G. W. Ry. Co. v. Fisher*, *ubi supra*.

other hand, is not entitled to recover from his sub-lessee, in an action for breach of covenant to repair, the amount of the damages recovered against him by the lessor, or the costs of proceedings brought against him by the lessor for non-repair, even though the covenants to repair be identical in the lease and the sub-lease (a). If the lessee wish to protect himself, he must obtain an express contract of indemnity from the sub-lessee (b).

(a) *Penley v. Watts*, (1841) 7 M. & W. 601; *Logan v. Hall*, (1847) 4 C. B. 598; *Pontifer v. Foord*, (1884) 12 Q. B. D. 152; *Clare v. Dobson*, [1911] 1 K. B. 35.

(b) *Penley v. Watts*, *ubi supra*, at p. 609; *Gooch v. Clutterbuck*, [1899] 2 Q. B. 148.

APPENDIX.

HADLEY *v.* BAXENDALE.

(1854) 9 Exch. 341.

Judgment.

ALDERSON, B. We think that there ought to be a new trial in this case ; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this ; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions ; and in *Blake v. Midland Railway Company* (1), the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at Nisi Prius.

“There are certain established rules,” this Court says, in *Alder v. Keighley* (2), “according to which the jury ought to find.” And the Court, in that case, adds : “and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.”

Now we think the proper rule in such a case as the present is this :—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise

(1) 21 L. J. Q. B. 237.

(2) 15 M. & W. 117.

generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person ? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it ; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by

the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

“THE MEDIANA.”

[1900] A. C. 113.

Judgment of Lord Halsbury, L.C.

EARL OF HALSBURY, L.C. My Lords, I think that this case is really governed by the principles laid down in this House in the case of *The Greta Holme* (1), and I therefore agree with the Court of Appeal and move your Lordships that this judgment be affirmed.

My Lords, it is true that in that case there were two circumstances which I mention for the purpose of pointing out that I do not omit to consider them, namely, that the dredger was actually prevented from doing work which the particular corporation entrusted with the duty of doing it had intended it to do; and further, as was pointed out by Lord Watson, the effect of not dredging during the period while the dredger was rendered incapable of doing its proper work was to set up an additional amount of silt which would itself of course be an injury which would properly sound in damages when the person responsible for taking away the dredger was called upon to pay. These two circumstances were not unnaturally pointed out by the learned counsel who challenged this judgment as shewing that there were grounds for the decision in that case which do not apply here. But, my Lords, I think it impossible to read the judgments of those noble and learned Lords who took part in that case without seeing that it rests upon a much wider and broader principle than would be applicable to the particular circumstances which I have referred to in that case. Lord Herschell in terms did lay down a much broader principle, and I may say that I myself intended to lay it down, though I may have expressed myself imperfectly, namely, that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages.

And, my Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. “Nominal damages” is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term “nominal damages” does not mean small

(1) [1897] A. C. 596.

damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages. Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages, nevertheless it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case ; how is anybody to measure pain and suffering in moneys counted ? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past ? But nevertheless the law recognizes that as a topic upon which damages may be given.

Now, in the particular case before us, apart from a circumstance which I will refer to immediately, the broad proposition seems to me to be that by a wrongful act of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase "the use of the vessel." What right has a wrong-doer to consider what use you are going to make of your vessel ? More than one case has been put to illustrate this ; for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish damages by shewing that I did not usually sit in that chair or that there were plenty of other chairs in the room ? The proposition so nakedly stated appears to me to be absurd ; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages of that sort. I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, "Well, if you wanted to hire a chair, what would you have to give for it for the period ?" and in that way they have come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner. Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except—and this I think has been the fallacy running through the arguments at the bar—when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognizes as special damage. In that case you must shew it, and by precise evidence, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so as to give the persons responsible for making good

the loss an opportunity of inquiring into it before they came into Court. But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damage at all: "We will give the plaintiff a trifling amount"—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious. It appears to me, therefore, that what the noble and learned Lords who gave judgment in your Lordships' House intended to point out, and what Lord Herschell gives expression to in plain terms, was that the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all. Of course I observe that it has been suggested that this was not an action for trover or detinue; but although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all. I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages. Leaving that aside, whatever be the form of action, the principle of assessing damages must be the same in all Courts and for all forms of what I may call the unlawful detention of another man's property.

My Lords, that seems to me to be so plain that I confess I have been somewhat puzzled to learn that it has been decided in the Admiralty Courts that the loss of the use of a vessel under the circumstances of this case has been treated (if it has been really so treated I have serious doubt about it) as something for which no moneys counted could possibly be allowed. I can only say that I am very glad such a principle has not been affirmed by your Lordships' House, because it seems to me to be inconsistent with principle and very unreasonable in itself.

My Lords, the only difficulty I have had in this case has been in regard to the case in the Privy Council (*The City of Peking* (1)). I think, with some labour, I have discovered the clue which guided the learned judges in coming to the conclusion that they did. It is to be observed in the first place that there is a difficulty in understanding that case without the reports of those persons who had to assess the damages—it was the registrar, not a jury; and the report certainly is not a model of clearness so far as it is quoted. It is very difficult, indeed, to understand the judgment without having the report before one, but I think I have discovered the clue to the judgment which was arrived at. At page 447 of the report I find this as part of the judgment: "It would be very unjust to charge the defendant 95*l.* a day or anything for the loss of the use of the *Saghalien* during her detention at Hong Kong for the time during which the *Melbourne* and her crew were doing"

(this is I think the clue to the whole story) “ at the defendants’ expense the work which the *Saghalien* and her crew ought to have done.” I have not been able sufficiently to disentangle the facts to say whether that included anything for the use of the vessel or not ; but the principle upon which they decided it was that the defendants were themselves chargeable and paid for the use of the *Melbourne* in place of the other vessel—that it belonged as a matter of fact to the plaintiffs is immaterial. The principle of the decision, as I gather it from that passage, is that the defendants had already paid for the use of it and for the use of the crew and for the navigation of it, and therefore if during that period when the defendants were actually called upon by the registrar’s report to pay for the use of the *Melbourne* they had had to pay 95*l.* a day also for the detention of the *Saghalien*, it is very obvious that they would have been paying twice over, and therefore not unnaturally, I think, the Court came to the conclusion in that case, not as a principle of law at all, but as applicable to the particular facts of that case, that, to put in plain terms what I understand to be the effect of the judgment, you cannot have damages for that detention because you have already got paid for the use of the substituted vessel in the form of the damages that the registrar has assessed. If that is the principle of the case, of course it is not inconsistent with, but, on the contrary, on the same lines with the judgment which the Court of Appeal has given in the present case. Whether the question was raised or not of the absolute use of the vessel as distinguished from the payment of the crew and all the other things that were included in the lump sum in the registrar’s report, I am not able to say. Happily we have present to-day one of the noble and learned Lords who took part in that judgment, and he will probably be able to tell your Lordships whether that question was raised or not. Undoubtedly it is not raised in the report at all, but, as I say, the clue to the judgment is what I have already pointed out, and therefore, to my mind, that decision presents no difficulty at all in arriving at the conclusion I have indicated, namely, that this judgment ought to be affirmed ; and I therefore move your Lordships that this appeal be dismissed with costs.

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